CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 28

HERTHA J. SIBBACH, PETITIONER,

vs.

WILSON & COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 9, 1940.

CERTIORARI GRANTED APRIL 8, 1940.

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SUPREME COURT OF THE UNITED STATES

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1 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

Hildegard Reinke, *et al.*
vs.
Wilson & Company, Inc. } No. 46814.

AGREED STATEMENT OF FACTS ESSENTIAL TO A DECISION BY THE CIRCUIT COURT OF APPEALS.

The following is an agreed statement of the case, showing how the questions arose and were decided in the District Court, and sets forth only so many of the facts averred and proved as are essential to a decision of the questions by the Circuit Court of Appeals.

This was a suit commenced in the United States District Court on November 24, 1937, against the defendant to recover damages for personal injuries.

The complaint alleged that on the 3rd day of September, A. D. 1937, the plaintiff Hertha Sibbach was injured in the State of Indiana through the negligent acts of the defendant, and as a result of said injuries she was greatly cut, wounded, lacerated, and contused in and about her head, body, arms, and legs, and divers bones in plaintiff's body were broken and fractured, and plaintiff became and was and has so remained from thence hitherto sick, sore, lame, diseased, and disordered, and has suffered great pain; all of which injuries plaintiff claimed were permanent and lasting. Plaintiff claimed that she had been and in the future will be hindered and prevented from earning and acquiring divers great gains and profits which she might otherwise have made and obtained; that the plaintiff became liable for and expended large sums of money, to-wit, Five Hundred ($500) Dollars, en-
2. deavoring to be healed and cured of said injuries.

The plaintiff Hertha Sibbach claimed damages from the defendant in the sum of Ten Thousand ($10,000) Dollars.

The defendant filed an answer to the complaint in which it denied each and every one of said allegations in the complaint.

On the 6th day of May, 1939, the defendant filed a motion in Court, pursuant to the Federal Rules of Civil Procedure, Rule 35, in words and figures, as follows:

The defendant further moves the court for an order that each of the plaintiffs submit to a physical examination, including or together with an x-ray examination, before trial, by a physician or physicians to be appointed by this court, to determine the exact nature and extent of the injuries in controversy herein, alleged to have been sustained by them on the 3rd day of September, 1937, as the result of the act or acts alleged in plaintiff's amended complaint, at such time or times as this court may direct.

The defendant is informed and believes that it is essential to the proper trial of this case that each of the plaintiffs should submit to examination by deposition and to such physical examination, in advance of trial, as is more fully shown in the affidavit hereto attached in support of these motions.

In support of said motion, the defendant then and there also filed an affidavit in words and figures, as follows:

P. W. Seyl, being first duly sworn, on his oath states: That he resides at 320 Normal Parkway, Chicago, Illinois, and is the treasurer of the defendant in the above entitled cause; that the above cause of action was brought to recover damages alleged to have been sustained by the plaintiffs as the result of the alleged negligence of the defendant, for a more detailed statement of which, reference is hereby made to the amended complaint filed in said cause, and that the cause is now at issue and pending trial upon the calendar of this court;

That the amended complaint alleges that each of the plaintiffs has been seriously injured and disabled; and that the physical condition of the plaintiff is in controversy and as to the truth of said allegations, the defendant has no means of knowing, other than by examination, by approved methods, the injuries complained of not being patent or clearly to be seen without such examination;

That in order properly to prepare this cause for trial and to proceed to trial with safety, it is necessary that the defendant be permitted to examine each of the plaintiffs by deposition prior to the trial of this cause concerning the facts and circumstances pertaining to the allegations set forth in said amended complaint and affiant is informed by the attorneys for the defendant and verily

believes, that defendant cannot fully prepare for trial
3 unless an order is granted directing that each of the plaintiffs submit to a physical examination as requested, with leave to take x-ray photographs in conjunction with such physical examinations and the inspection of any x-ray photographs already taken or which may hereafter be taken of any of the plaintiff.

Wherefore, affiant respectfully requests that an order be entered herein directing each of the plaintiffs to appear for examination by deposition at such time and place specified in the motion to which this affidavit is attached and made a part thereof and that an order be entered directing each of the plaintiffs to appear at such time or times and place or places as are convenient to them and to the physician or physicians to be designated by the court and to submit to a physical examination by one or more of the physicians to be designated by the court and in conjunction therewith to permit x-ray photographs to be taken of the parts of the bodies of the respective plaintiffs alleged to have been injured and that the x-ray photographs, if any, which already have been made of the plaintiffs be produced for inspection by the defendant, and its attorneys or representative, and that the defendant have such other, further and different relief as may be proper.

Thereupon, on June 6th, 1939 the Court ordered the plaintiff, Hertha Sibbach, to submit to a physical examination by Dr. Guy V. Pontius (who was appointed by the Court as the examining physician), at his office at 104 South Michigan Avenue, Chicago, Illinois, on June 7, 1939.

The plaintiff, Hertha Sibbach, refused to submit to such physical examination by Dr. Guy V. Pontius, on June 7, 1939, and thereafter, on the 5th day of July, A. D. 1939, the defendant filed a petition in said proceeding, in words and figures, as follows:

1. That on motion of this defendant, each of the plaintiffs in this cause was ordered to submit to a physical examination by Dr. Guy V. Pontius at his office at 104 South Michigan Avenue, Chicago, Illinois.

2. That the plaintiff, Hertha Sibbach, was ordered by this court to submit to such physical examination by Dr. Guy V. Pontius on June 7, 1939.

3. That said plaintiff, Hertha Sibbach, failed to present herself for such physical examination at the time and place heretofore designated by this court and still fails

and refuses to submit to such examination in disregard of the order of this court.

Wherefore, the defendant respectfully prays that a rule be entered on the plaintiff, Hertha Sibbach, to show cause why she should not be punished for contempt of this court in refusing to obey the aforesaid order of this court.

The Court thereupon entered a rule upon the plaintiff to show cause returnable July 6, 1939 why she should not be punished for contempt of Court in failing and refusing to submit to a physical examination as provided for by the order of Court entered on the 6th day of June, A. D. 1939.

On the 6th day of July, A. D. 1939, the plaintiff appearing in Court in person and by her attorney filed in Court her answer in words and figures, as follows:

Now comes the plaintiff, Hertha Sibbach, and for answer to the rule of Court entered herein upon her to show cause why she should not be punished for contempt of Court for failure to submit to a physical examination by Dr. Guy V. Pontius, on June 7, 1939, says:

1. This Court was without power to enter an order upon the plaintiff Hertha Sibbach to submit to a physical examination by Dr. Guy V. Pontius on the 7th day of June, 1939, because the inviolability of the person of the plaintiff would be invaded.

2. The Court is without power to require the plaintiff to submit to a physical examination by Dr. Guy V. Pontius on the 7th day of June, 1939, because such an order would be contrary to Section 34, of the Federal Judiciary Act of September 24, 1789, Chapter 20, 28 U. S. C. A. Section 725, inasmuch, as by the unwritten laws of the States of Illinois and Indiana, as declared by their highest Courts of those States the Courts have no power to compel the plaintiff in a personal injury case to submit to a physical examination.

3. The order of Court is contrary to the provisions of Article V, of the Constitution of the United States.

The plaintiff, Hertha Sibbach, therefore, prays that the rule entered upon her be discharged.

The said petition and answer came on for hearing in open Court on the 6th day of July, 1939, the plaintiff being present in Court, and the Court thereupon granted said petition and did on the 7th day of July, 1939, enter the following order:

This cause coming on further to be heard on the peti-

tion of the defendant, filed herein on July 5, 1939, for a rule on the plaintiff, Hertha Sibbach, to show cause why she should not be punished for contempt of this court in refusing to obey the order of this court in this cause entered on June 6, 1939, that she submit to a physical examination by Dr. Guy F. Pontius, at his office at 104 South Michigan Avenue, Chicago, Illinois, on June 7, 1939, as provided by the Rules of Civil Procedure for the District Courts of the United States, and it appearing to the court that counsel for the plaintiff, Hertha Sibbach, upon the filing of said petition, in open court, waived the necessity of a verification of defendant's said petition, consented to file an answer on behalf of said Hertha Sibbach to said petition, and that this court enter the aforesaid rule on said Hertha Sibbach returnable on July 6, 1939, at 10:00 A. M. before this court, and it further appearing to this court that said rule was so issued returnable on July 6, 1939, at 10:00 A. M. before this court, and that said Hertha Sibbach, in person and by and through her attorney, appeared in open court and filed her answer to the foregoing petition on July 6, 1939, at 10:00 A. M., and this court having considered the aforesaid petition and answer thereto, the arguments of counsel, and being fully advised in the premises, the court is of the opinion and Orders and Adjudges that said Hertha Sibbach is guilty of contempt in her disobedience of said order of this court hereinbefore entered on June 6, 1939, requiring her to submit to the aforesaid physical examination, by failing and neglecting without sufficient and legal cause or excuse therefor, to appear at the time and place designated in said order and to submit to such examination, and that, for her said contempt, said Hertha Sibbach, now being present in open court, be committed to the common jail of Cook County, in the State of Illinois, until she complies with the aforesaid order of this court or until she is otherwise legally discharged from custody.

To which ruling of the Court the plaintiff Hertha Sibbach excepted, and prayed an appeal from said order to the Circuit Court of Appeals for the Seventh Circuit.

Thereupon, on the 7th day of July, 1939, the plaintiff Hertha Sibbach filed her notice of appeal in words and figures, as follows:

Hertha J. Sibbach, Plaintiff in the above entitled cause, hereby files this her notice of appeal from the judgment of the District Court of the United States for the North-

ern District of Illinois Eastern Division to the Circuit Court of Appeals of the United States for the seventh circuit said judgment having been entered on the 7th day of July, 1939.

Filed July 12, 1939. On the 12th day of July, 1939, the plaintiff Hertha Sibbach filed a statement of the points to be relied upon by the appellant Hertha Sibbach on her appeal to the Circuit Court of Appeals for the Seventh Circuit, in words and figures, as follows:

6 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—46814) * *

STATEMENT OF POINTS UPON WHICH HERTHA SIBBACH, PLAINTIFF, INTENDS TO RELY ON THE APPEAL.

1. This Court was without power to enter an order upon the plaintiff Hertha Sibbach to submit to a physical examination by Dr. Guy V. Pontius on the 7th day of June, 1939, because the inviolability of the person of the plaintiff would be invaded.

2. The Court is without power to require the plaintiff to submit to a physical examination by Dr. Guy V. Pontius on the 7th day of June, 1939, because such an order would be contrary to Section 34, of the Federal Judiciary Act of September 24, 1789, Chapter 20, 28 U. S. C. A. Section 725, inasmuch, as by the unwritten laws of the States of Illinois and Indiana, as declared by their highest Courts of those States the Courts have no power to compel the plaintiff in a personal injury case to submit to a physical examination.

3. The order of Court is contrary to the provisions of Article V, of the Constitution of the United States.

4. The Court erred in entering an order depriving the plaintiff of her liberty without due process of law, as guaranteed by the Constitution of the United States.

Royal W. Irwin,
Attorney for Hertha Sibbach, Plaintiff.

7 It is agreed by and between the undersigned that the Clerk of the District Court shall include this statement in the record on appeal in lieu of designation of the contents of record on appeal, as provided by Rule 75 (a) of the Rules of Civil Procedure.

Royal W. Irwin,
Attorney for Hertha Sibbach, Appellant.

Wilson & McIlvaine,
Attorney for Wilson & Company, Inc., Appellee.

Dated at Chicago, Illinois, July 12th, 1939.

I certify that the above statement of facts sets forth only so many facts averred and proved as are essential to a decision of the questions by the Circuit Court of Appeals. The statement conforms to the truth and is hereby approved.

Philip L. Sullivan,
Judge of the District Court.

8 Endorsed: In the District Court of the United States. * * (Caption—46814) * * Agreed Statement of Facts Essential to a Decision by the Circuit Court of Appeals and Proof of service Judge Sullivan July 12, 1939.

9 Northern District of Illinois, } ss.
Eastern Division. }

I, Hoyt King, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete Agreed Statement of Facts essential to a Decision by the United States Circuit Court of Appeals, filed July 12, A. D. 1939, in this Court in the case entitled—Hildegard Reinke, *et al. vs.* Wilson & Company, Inc. No. 46814, as the same appear from the original records and files thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 11th day of August, A. D. 1939.

Hoyt King,
(Seal) *Clerk.*

10 Endorsed: Filed Aug 15 1939 Frederick G. Campbell, Clerk.

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UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 7, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the sixteenth day of August, 1939, upon which the following entitled cause was heard and determined:

Hertha J. Sibbach,
Plaintiff-Appellant,

vs.

Wilson & Company, Inc.,
Defendant-Appellee,

No. 7048, October Term, 1939, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of March, A. D. 1940.

Frederick G. Campbell,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

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At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun in the fourth day of October, in the year of our Lord one thousand nine hundred and thirty-eight, and of our Independence the one hundred and sixty-third.

Hertha J. Sibbach,
Plaintiff-Appellant,
7048 *vs.*
Wilson & Company, Inc.,
Defendant-Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

And, to-wit: On the sixteenth day of August, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellant which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7048. October Term, 1939.

Hertha J. Sibbach,

vs.

Wilson & Company, Inc.

The Clerk will enter my appearance as counsel for the plaintiff.

Royal W. Irwin,
160 N. La Salle—Fra. 5454.

Endorsed: Filed August 16, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the thirteenth day of September, 1939, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7048.

Hertha J. Sibbach,
Plaintiff-Appellant,
vs.
Wilson & Company, Inc.,
Defendant-Appellee.

APPEARANCE.

We hereby enter our appearance in the above entitled cause as attorneys for Wilson & Company, Inc., Defendant-Appellee in the above entitled cause.

J. F. Dammann,
Kenneth F. Montgomery,
Sidney K. Jackson,
120 West Adams Street,
Tel: Andover 1212,
Chicago, Illinois.

Of Counsel:
Wilson & McIlvaine,
120 West Adams Street,
Chicago, Illinois,
Tel: Andover 1212.

Endorsed: Filed September 13, 1939. Frederick G. Campbell, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the third day of October, in the year of our Lord one thousand nine hundred and thirty-nine, and of our Independence the one hundred ad sixty-fourth.

And, to-wit: On the thirtieth day of November, 1939, the following further proceedings were had and entered of record, to-wit:

Thursday, November 30, 1939.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

Hertha J. Sibbach, *Plaintiff-Appellant,* *vs.* Wilson & Company, Inc., *Defendant-Appellee.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

7048

Now this day come the parties by their counsel and this cause comes on to be heard on the transcript of the record and briefs of counsel and on oral argument by Mr. Royal W. Irwin, counsel for Appellant, and by Mr. Kenneth F. Montgomery, counsel for Appellee, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the thirteenth day of December, 1939, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

No. 7048. OCTOBER TERM AND SESSION, 1939.

HERTHA J. SIBBACH, *Plaintiff-Appellant,*
vs.
WILSON & COMPANY, INC., *Defendant-Appellee.*

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

December 13, 1939.

Before SPARKS, MAJOR and KERNER, *Circuit Judges.*

MAJOR, *Circuit Judge.* The plaintiff was injured in an automobile accident on the 3rd day of September, 1937, in the State of Indiana, and brought suit on November 24, 1937 in the United States District Court for the Northern District of Illinois, to recover damages for personal injuries sustained thereby. On June 6, 1939, the Court ordered plaintiff to submit to a physical examination at a designated physician's office. The plaintiff refused and, upon motion by the defendant, a rule was entered upon the plaintiff to show cause why she should not be adjudged in contempt of court in refusing to obey such order.

The plaintiff answered that the Court was without power to enter such an order either under the Federal law or the law of the State of Illinois.

Upon the hearing, the court, on June 7, 1939, found the plaintiff guilty of contempt and ordered that she be committed to the common jail of Cook County until she complied with said order, or until she was otherwise legally discharged. It is from this order the appeal is here.

We are convinced that the ultimate question to be determined is the validity of Rule 35 (a) of the Rules of Civil Procedure, effective September 16, 1938, by virtue of a proclamation of the Supreme Court. If this rule is valid,

it undoubtedly furnishes the authority for the order in question.

Congress, by its enactment of June 19, 1934, (28 U. S. C. A. 723 b) empowered the Supreme Court to prescribe, by general rules, for the District Courts, "the forms of process, writs, pleadings and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter, all laws in conflict therewith shall be of no further force or effect." Section 723 c of the Enabling Act preserves the right of trial by jury as at common law, and declared by the Seventh Amendment to the Constitution and, that such rules "shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof, and until after the close of such session."

The rules of civil procedure therefore were promulgated and given effect by reason of the authority contained in this Enabling Act. We do not understand any question is raised regarding the power of the Supreme Court to adopt rules consistent with this Act—in fact, it could not be disputed in view of the decisions of the Supreme Court approving the authority conferred by similar legislation. (*Wayman* v. *Southard*, 10 Wheaton 1; *Beers* v. *Haughton*, 9 Peters 329; 34 U. S. 329, 359.) It is argued here, however, the rule in question permits the invasion of a substantive right contrary to the language of the Enabling Act "nor modify the substantive rights of any litigant."

Plaintiff relies strongly—in fact, almost entirely upon the cases of *Union Pacific R. R. Co.* v *Botsford*, 141 U. S. 250 and *Camden and Suburban R. R. Co.* v. *Stetson*, 177 U. S. 172, in support of her position that the court was without the power to enter the order complained of. Undoubtedly, these authorities sustain her position provided the law has not been changed by the rule under attack. If the rule is valid, it follows that the holdings in these cases must be abandoned.

We therefore return to the question as to whether the Supreme Court was empowered by Congress to adopt the rule in question, and whether it was so empowered involves a determination of whether the rule permits an invasion of a substantive right as that term was used by Congress in the Enabling Act. In making such determination, it seems material to refer briefly to the procedure both prior and subsequent to the adoption of the rules by the Supreme

Court. After the enactment of the Enabling Act, the Supreme Court appointed an Advisory Committee (302 U. S. 783) to assist it in the preparation of such rules. This committee consisted of many distinguished members of the bar, including a number of professors and deans of law schools of leading universities. The committee devoted about two and one-half years to the tasks assigned them. Tentative drafts were prepared and submitted to the judges and lawyers throughout the country, and after much discussion and many changes, the final draft was submitted to the Supreme Court on November 4, 1937. The court, after considering the draft and making such changes as it deemed advisable, transmitted the rules to the Attorney General of the United States, and they were by him reported to Congress at the beginning of the regular session in January, 1938. Congress, having taken no positive action in connection therewith, under the Statute heretofore quoted, the rules became effective.

Plaintiff, in her brief, states:

> "It must be very apparent that the framers of the Rules of Civil Procedure were ill advised when this particular rule was included in the draft submitted to the Supreme Court."

We know of no justification for this statement, but if such there be, it would be of no avail to the plaintiff unless it also be concluded that both the court and Congress were likewise "ill advised." That the rules, including the one in controversy, were considered fully and at great length, both by the court and Congress, is apparent. That the court was aware of the language of the Enabling Act and of the powers conferred thereby, is not open to question. That Congress was familiar with the rules as transmitted to it, must at least be assumed. We think it must also be assumed that Congress, by its non-action, construed the rules as being within the power conferred. It follows, that regardless of prior court decisions holding to the contrary, both the Supreme Court and Congress have construed the right as not being substantive as that term was used in the Enabling Act. If we had any doubt otherwise (which we haven't) that the Supreme Court, in the adoption of the rule in question, was familiar with and considered its prior decisions in *Union Pacific R. R. Co.* v. *Botsford, supra,* and *Camden and Suburban R. R. Co.* v. *Stetson, supra,* that doubt is dispelled by the fact that those two cases were cited and discussed in the notes of the Advisory Committee. (See note following Rule 35, U. S. C. A.) We there-

fore conclude that the Supreme Court did not exceed the power conferred by Congress and that the rule is valid and has the effect of legislative enactment.

In addition to this construction by the Supreme Court and Congress, which we think decisive, we might add that there is grave doubt in our minds as to whether the right claimed in the instant case is a substantive one or not. In *Camden and Suburban R. R. Co.* v. *Stetson, supra,* one of the cases relied upon by plaintiff, it would seem the court indicated the contrary. On page 174, it said:

> "* * * It is not a question of a general nature, like the law merchant, but simply one concerning evidence based upon a local statute applicable to actions brought within the State to recover damages for injury to the person. * * *"

The rule being valid, it must be given general application, irrespective of any State enactment or court decision to the contrary. There is no occasion, therefore, for us to determine the rule followed by the Illinois Courts. In any event, it is not applicable.

The order of the District Court is

AFFIRMED.

Endorsed: Filed December 13, 1939. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the thirteenth day of December, 1939, the following further proceedings were had and entered of record, to-wit:

Wednesday, December 13, 1939.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

7048	Hertha J. Sibbach, *Plaintiff-Appellant,* *vs.* Wilson & Company, Inc., *Defendant-Appellee.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On Consideration Whereof: It is now here ordered and adjudged by this Court that the Judgment of the said District Court, in this cause be, and the same is hereby affirmed with costs.

UNITED STATES CIRCUIT COURT OF APPEALS,

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing 11 printed pages, numbered from 11 to 18, inclusive, contain a true copy of the proceedings had and papers filed, excepting briefs of counsel, in the case of

Hertha J. Sibbach,
Plaintiff-Appellant,

vs.

Wilson & Company, Inc.,
Defendant-Appellee,

No. 7048, October Term, 1939, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of March, A. D. 1940.

Frederick G. Campbell,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 8, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 28

HERTHA J. SIBBACH,
Petitioner,

vs.

WILSON & COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

LAMBERT KASPERS,
Attorney for Petitioner.

ROYAL W. IRWIN and
JAMES A. VELDE,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. .....

HERTHA J. SIBBACH,

Petitioner,

vs.

WILSON & COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Hertha J. Sibbach respectfully shows:

(1) Statement of Matter Involved.

The petitioner (plaintiff in the trial court) brought an action against the respondent (defendant in the trial court) for damages for personal injuries in the United States District Court for the Northern District of Illinois, Eastern Division. The complaint alleged a physical injury to the plaintiff in the State of Indiana as a result of the negligence of the defendant and claimed damages (R. 1). Before trial the defendant filed a motion for an order directing

the plaintiff (together with other plaintiffs) to submit to a physical examination pursuant to Rule 35 of the Federal Rules of Civil Procedure (R. 2). The trial court ordered the plaintiff to submit to an examination by a physician named in the order (R. 3). The plaintiff refused to be examined (R. 3), and the defendant filed a petition for a rule directing the plaintiff to show cause why she should not be punished for contempt in refusing to obey the order (R. 3-4). A rule was entered and the plaintiff answered that the court was without power to enter the order directing her to submit to an examination (R. 4). By a judgment entered on July 7, 1939, the court found the petitioner guilty of contempt of court for disobedience of the order to submit to a physical examination and ordered her committed to jail until she complied with the order to submit to a physical examination or until otherwise discharged by legal process (R. 5). From the judgment of contempt and commitment the plaintiff appealed to the Circuit Court of Appeals for the Seventh Circuit, claiming that the order to submit to a physical examination was invalid (R. 6). The Circuit Court of Appeals affirmed the judgment of the District Court on the ground that Rule 35(a) of the Federal Rules of Civil Procedure authorized the order to submit to a physical examination and was valid (R. 14-18).

(2) Basis of Jurisdiction of This Court.

(a) The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. 347a).

(b) Rule 35 (a) of the Federal Rules of Civil Procedure, the validity of which is involved in this case, provided in part as follows:

> "In an action in which the mental or physical condition of a party is in controversy, the court in which

the action is pending may order him to submit to a physical or mental examination by a physician."

The Federal Rules of Civil Procedure were promulgated by this Court pursuant to the so-called Rules Enabling Act (Act of June 19, 1934, c. 651, secs. 1, 2; 48 Stat. 1064; 28 U. S. C. 723b, 723c), of which section 1 provided in part as follows:

> "The Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

(c) The judgment of the Circuit Court of Appeals sought to be reviewed was entered on December 13, 1939 (R. 18).

(3) Questions Presented.

The judgment of the Circuit Court of Appeals sought to be reviewed affirmed a judgment of the District Court holding the petitioner in contempt of court for disobeying an order of the District Court that directed the petitioner to submit to a physical examination pursuant to Rule 35 of the Federal Rules of Civil Procedure. The petitioner refused to obey the order directing her to submit to a physical examination on the ground that Rule 35 is invalid as to her (R. 4, 6). The question presented by this petition is: Does Rule 35 of the Federal Rules of Civil Procedure abridge or modify the substantive rights of the petitioner contrary to the provisions of the Rules Enabling Act? If so, the order entered under Rule 35 directing the petitioner

to submit to a physical examination exceeded the power of the trial court, and the judgment of contempt for disobedence of the order was invalid.

(4) Reasons for Allowance of Writ.

The Circuit Court of Appeals in this case has decided an important question of federal law which has not been, but should be, settled by this Court. As indicated above, the question is the validity as to the plaintiff, a litigant in a federal court sitting in Illinois, of Rule 35 of the Federal Rules of Civil Procedure. The decision of the Circuit Court of Appeals holds that this Court was authorized to adopt Rule 35 by the Rules Enabling Act. The petitioner contends that Rule 35 is invalid because it modifies and abridges her substantive rights contrary to the express provisions of the Rules Enabling Act. The importance of the question of the validity of Rule 35 as to the petitioner is obvious: on its determination will depend the future availability of the remedy provided by Rule 35 in federal courts sitting in Illinois and other states. Also, this question involves another question of wider significance: the meaning of the term "substantive rights" in the Rules Enabling Act. This larger question has been the subject of much discussion and doubt, particularly in connection with the case of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). See Tunks, *Categorization and Federalism: "Substance" and "Procedure" after Erie Railroad* v. *Tompkins* (1939), 34 Ill. L. Rev. 271, 279 *et seq.*; Hart, *Business of the Supreme Court at the October Terms, 1937 and 1938* (1940), 53 Harv. L. Rev. 579, 606-611, n. 62 at p. 610. That these questions have not been, but should be, settled by this court is shown by the annexed brief in support of this petition.

It is submitted that these reasons call for the exercise of this Court's power of review.

Wherefore, the petitioner respectfully prays: that a writ of certiorari be issued out of and under the seal of this Court commanding the United States Circuit Court of Appeals for the Seventh Circuit to certify and send to this Court for its review and determination on a day certain named therein a complete transcript of the record in the case numbered and entitled on its docket as No. 7048, Hertha J. Sibbach, Plaintiff-Appellant, *v.* Wilson & Company, Inc., Defendant-Appellee; that the judgment of the Circuit Court of Appeals may be reversed by this Court; and that the petitioner may have such other and further relief as seems just.

HERTHA J. SIBBACH,
Petitioner.

By LAMBERT KASPERS,
Attorney for Petitioner.

ROYAL W. IRWIN and
JAMES A. VELDE,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. .....

HERTHA J. SIBBACH,

Petitioner,

vs.

WILSON & COMPANY, INC.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(a) Index.

An index to this brief with tables of authorities cited appears at pp. i-v preceding the Petition, *supra*.

(b) Opinion of the Court Below.

The opinion of the Circuit Court of Appeals (R. 14-17) is reported in *Sibbach* v. *Wilson & Company, Inc.*, 108 F. (2nd) 415 (1939).

(c) Statement of Jurisdiction.

A statement of the grounds on which the jurisdiction of this Court is invoked appears in the Petition, *supra*, p. 2, under the heading, "Basis of Jurisdiction of this Court" and is not repeated here in the interest of brevity.

(d) Statement of the Case.

A statement of the case appears in the Petition, *supra*, p. 1, under the heading "Statement of the Matter Involved" and is not repeated here in the interest of brevity.

(e) Specification of Errors.

The Circuit Court of Appeals erred in holding that the order directing the petitioner to submit to a physical examination and the judgment of contempt and commitment for disobedience of the order were valid; and in affirming the judgment of the District Court.

(f) Argument.

SUMMARY OF ARGUMENT.

I. The Background of Rule 35 and the Scope of the Question Presented.

II. Rule 35 Abridges the Substantive Rights of the Plaintiff.

A. The Substantive Rights which the Rules Enabling Act Forbade to Be Modified by the Federal Rules of Civil Procedure Include Rights Not Determinative of the Ultimate Result of Litigation.

(1) "Substantive rights" and "procedure" and the doctrine of the separation of powers.

(2) The limitation contained in the Rules Enabling Act.

B. Decisions of this Court Indicate that an Order for a Physical Examination Modifies Substantive Rights.

C. The Substantive Character of the Right Modified by Rule 35 Is Indicated by the Questions of Legislative Policy Involved in the Promulgation of the Rule.

D. Comparison of Rule 35 with Other Rules.

E. Conclusion: Rule 35 Abridges the Substantive Rights of the Plaintiff and is Invalid as to the Plaintiff.

III. The Fact That This Court and the Congress Duly Considered Rule 35 Does Not Preclude the Plaintiff from Questioning Its Validity, Particularly in View of the Error in the Advisory Committee's Note to the Rule.

IV. The Law of Indiana Does Not Furnish Authority for the Order Directing the Plaintiff to Submit to a Physical Examination.

V. Conclusion.

I. The Background of Rule 35 and the Scope of the Question Presented.

Text of Rule 35

The title and text of Rule 35 of the Federal Rules of Civil Procedure are as follows:

"Rule 35. Physical and Mental Examination of Persons

"(a) Order for Examination. In an action in which the mental or physical condition of a party is

in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

"(b) Report of Findings.

"(1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

"(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition."

Text of Rules Enabling Act

The text of the Rules Enabling Act pursuant to which Rule 35 and the other Federal Rules of Civil Procedure were promulgated is as follows:

> "Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.
>
> "Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: Provided, however, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session." (Act of June 19, 1934, c. 651, Secs. 1, 2 (48 Stat. 1064), U. S. C. Title 28, Secs. 723b, 723c.)

Rule in Federal Courts Before Adoption of Rule 35

Before the adoption of Rule 35 by this Court, a federal court had no power to order a plaintiff to submit to a physical examination unless a statute of the state in which

the federal court was sitting provided for the order. This Court held in *Union Pacific Railway Company* v. *Botsford*, 141 U. S. 250 (1891), that a federal judge did not have power to compel a plaintiff to submit to a physical examination; and in *Camden & Suburban Railway Company* v. *Stetson*, 177 U. S. 172 (1900), that, if a state statute provided that a plaintiff could be ordered to submit to a physical examination, a federal judge sitting in a federal court in that state could order a plaintiff to be examined under the authority of the Rules of Decision Act (sec. 34, Judiciary Act of 1789, Rev. Stat. sec. 721; 28 U. S. C. sec. 725) applied in connection with the state statute. The *Botsford* and *Stetson* cases are discussed fully in this brief at pp. 30 to 33 and 34 to 38, respectively.

Rules in the State Courts

In the state courts there have been three different situations with reference to the power of a court to order a physical examination.

(a) In some states, as in Illinois, the courts have held that they had no power to compel a plaintiff to submit to a physical examination, following in some cases the lead of this Court in the *Botsford* case. See 4 Wigmore on Evidence (2d ed. 1923) 729, footnote 13, which cites cases.

(b) In other states, the courts have held that a trial court had inherent power to enter the order. See Wigmore on Evidence, op. cit. *supra*. The leading case so holding has been *Schroeder* v. *R. Co.*, 47 Iowa 375 (1877), which was discussed but not followed by this Court in the *Botsford* case.

(c) In some states the physical examination of parties before trial is authorized by statute. The statutes of six states—Arizona, Michigan (court rule), New Jersey, New

York, South Dakota, and Washington—are cited in the note to Rule 35 in *Notes to the Rules of Civil Procedure for the District Courts of the United States*, March, 1938, p. 32, prepared and printed under the direction of the Advisory Committee on Rules for Civil Procedure. In at least one of those states (New York), it was held before the enactment of the statute that a court did not have power to order the examination without a statute. *McQuigan* v. *Ry. Co.*, 129 N. Y. 50, 29 N. E. 235 (1891).

The Illinois Cases

The Illinois decisions, which are particularly important in the instant case because it was brought in a United States District Court in Illinois, show a strong policy *against* the granting of orders to compel a plaintiff to submit to a physical examination. In *Peoria, D. & E. Ry. Co.* v. *Rice*, 144 Ill. 227, 33 N. E. 951 (1893), after stating that the Illinois court is committed to the doctrine that a trial court has no power to order the examination, the opinion continued (p. 232):

> "We do not think injustice is likely to result to a defendant by a refusal to make such an order, especially when given the full benefit of the fact that the plaintiff has refused to submit voluntarily thereto, as was done in this case, both by evidence and instructions to the jury. *The contrary rule would often operate harshly upon the plaintiff, result in embarrassment to the court in trying cases, and be very liable to abuse.* Rules of practice must be laid down, not with reference to a single case, but to be applied generally, and we entertain no doubt that our conclusion heretofore announced on this subject is the better and safer practice." (Citing earlier Illinois cases as well as the *Botsford* case; italics supplied.)

In *Mattice* v. *Klawans*, 312 Ill. 299, 143 N. E. 866 (1924), the Illinois court held that the policy behind the rule denying the power to order the examination made it improper to ask the plaintiff before the jury whether or not he was willing to submit to an examination. The opinion stated at p. 307:

> "The settled law of this State is that the plaintiff in an action of this kind cannot be required to submit to a physical examination as to his injuries (*City of Chicago* v. *McNally*, 227 Ill. 14), and it is but an evasion of that rule to permit the plaintiff to be required to state to the jury that he is not willing to submit to such an examination. To permit such a question to be asked in the presence of the jury practically compels him to submit to the examination because of the unfavorable effect likely to be produced upon the minds of the jury if he refuses. Medical experts are not infallible, and however conscientiously and carefully the examination is made there is a possibility that an erroneous conclusion may be reached. There is no law under which the court could direct or control such an examination, and until the people of this State, acting through their representatives in the General Assembly, determine that the administration of justice requires that such authority be vested in the courts, defendants in personal injury actions will not be permitted to do indirectly what they cannot do directly."

This quotation was summarized with approval in *People* v. *Scott*, 326 Ill. 327, 157 N. E. 247 (1927), where it was held to be improper for the court in an insanity hearing to permit the state to show that the defendant had refused to allow physicians appointed by the court to examine him. In that case the reason given against the ordering of a

mental examination by the court in an insanity hearing—the undue weight that the jury would attach to the testimony of the court physician—applies with equal force to an action for personal injuries. The language of the opinion was as follows (326 Ill. 347):

> "It is apparent that if the court were permitted, either on his own motion or on that of the People, to select experts to examine a defendant as to his sanity, it would not be possible to keep the fact from the jury that they were the court's witnesses selected for such purpose, and it would not be possible to keep the prosecutor from arguing to the jury that they were the really fair witnesses and the only fair and competent witnesses testifying on such question, and that an inquiry into the sanity of a defendant in that manner would be simply a farce."

The strong policy in Illinois against the ordering by the court of a physical examination is apparent. The decisions go further than holding that the courts do not have power to order a physical examination. The policy behind that rule is protected by the further holding that the plaintiff may not be asked at the trial about his or her willingness to submit to the examination.

Scope of Question Presented

The plaintiff contends in this case that an order for a physical examination may not be granted under Rule 35 in a federal court sitting in a state, as Illinois, where there is no state statute providing for the order and where the state courts hold the order to exceed a court's power. The Rules Enabling Act quoted above (p. 11) provided that the rules should not "abridge the substantive rights of any litigant." Plaintiff contends that Rule 35 abridges her

substantive rights because she has a right in the Illinois courts not to be compelled to submit to a physical examination; and that Rule 35 is thus invalid as to her. The result sought here by the plaintiff as to Rule 35 accords with the result reached as to Rule 8(c) in *Francis* v. *Humphery*, 25 F. Supp. 1 (E. D. Ill. 1938). Rule 8(c) provides that the defendant must plead affirmatively the plaintiff's contributory negligence. This provision was held invalid as a modification of the defendant's substantive rights in Illinois, where the courts require the plaintiff to allege and prove his freedom from contributory negligence.

It may be that Rule 35 does not abridge substantive rights of litigants in federal courts sitting in states where state statutes, as noted above at p. 12, permit orders for physical examinations. The principles laid down in the *Stetson* case (cited above at p. 12) seem to validate Rule 35 in federal courts in those states. Also, it may be that Rule 35 does not abridge substantive rights in federal courts sitting in states where the courts have held (as noted above at p. 12) that they have inherent power to order a physical examination irrespective of statute. The *Stetson* case held that the Rules of Decision Act permits a federal court to follow a state statute granting the power to order a physical examination (this point is discussed herein at p. 38). Under the decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), the Rules of Decision Act requires a federal court to follow state court decisions. As a result, aside from Rule 35, a federal court is perhaps required to order a physical examination in a proper case if the state court decisions in the state where the federal court sits require the order. If this is true, in federal courts in those states Rule 35 may not abridge substantive rights and may be valid.

This case involves only one aspect of Rule 35—the grant of power to order a physical examination as made in subdivision (a) of the rule. Paragraph (2) of subdivision (b) of the rule provides that, if a plaintiff who has been examined under court order requests and obtains a copy of the examiner's report, any privilege of the plaintiff as to other physical examinations is thereby waived. It may be that the argument made by the plaintiff in this brief would indicate that this provision for waiver of a privileged communication by a patient to a physician modifies substantive rights and is invalid. However, the physician-patient privilege is statutory and there is no statutory provision for it in Illinois. Consequently, this case does not involve the validity of paragraph (2) of subdivision (b) of Rule 35.

If this Court holds Rule 35 to be invalid as to the plaintiff as argued in this brief, it may be argued that the order here attacked may be upheld on another ground. The alleged negligent act of the defendant and the plaintiff's injury occurred in the State of Indiana. It has been held in Indiana that a court has inherent power to order a plaintiff to submit to a physical examination. *City of South Bend* v. *Turner*, 156 Ind. 418, 60 N. E. 271 (1901). Is it incumbent on a federal court sitting in Illinois to follow this Indiana rule? Plaintiff contends that it is not, that the law of Illinois—the law of the forum—governs. Point IV of this brief (pp. 51 to 54) contains the argument on this point.

II. Rule 35 Abridges the Substantive Rights of the Plaintiff.

A. The Substantive Rights which the Rules Enabling Act Forbade to be Modified by the Federal Rules of Civil Procedure Include Rights not Determinative of the Ultimate Result of Litigation.

The Rules Enabling Act (quoted above in this brief at p. 11) provided that the Federal Rules of Civil Procedure should not "modify the substantive rights of any litigant." It may be that an order compelling the plaintiff to submit to a physical examination does not determine the right which the plaintiff seeks to have adjudicated in the litigation. And not involving a right of this character, the order may involve "procedure" and may not involve what is commonly meant by the term "substantive law." Plaintiff contends that the order nevertheless invades her "substantive rights." This contention requires a consideration of the meaning of the limitation in the Rules Enabling Act in the light of the limitations imposed on the rule-making power of courts by the doctrine of the separation of powers.

(1) *"Substantive rights" and "procedure" and the doctrine of the separation of powers.*

In several early cases this Court upheld the validity of rules of court promulgated pursuant to Acts of Congress. *Wayman* v. *Southard,* 10 Wheat. 1 (1825); *Bank of U. S.* v. *Halstead,* 10 Wheat. 51 (1825); *Beers* v. *Haughton,* 9 Peters 329 (1835). In the *Wayman* case, Mr. Chief Justice Marshall, after quoting the 17th section of the Judiciary Act of 1789 and the 7th section of an additional Act (Act of 1793, ch. 22, s. 7), continued as follows (pp. 42 and 43):

> "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which

are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. Without going farther for examples, we will take that, the legality of which the counsel for the defendants admit. The 17th section of the judiciary act, and the 7th section of the additional act, empower the courts respectively to regulate their practice. It certainly will not be contended that this might not be done by Congress. The courts, for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended that these things might not be done by the legislature, without the intervention of the courts; yet it is not alleged that the power may not be conferred on the judicial department.

"The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."

And in the *Beers* case, although the question there involved was merely one of a rule concerning a writ of execution, Mr. Justice Story indicated how broad he considered the rule-making power delegable by Congress to the courts by saying (9 Peters 360) that it embraced "the whole progress of * * * (the) suit, and every transaction in it from its commencement to its termination, and until the judgment should be satisfied."

Limitations on the rule-making power have also been noted by this Court. The opinion in the *Wayman* case,

quoted above, said that Congress may not delegate to the courts "powers which are strictly and exclusively legislative." And recently the function of the rule-making power and the limitations attending it were discussed in the opinion of Mr. Justice Brandeis in *Washington-Southern Nav. Co.* v. *Baltimore & P. S. Co.*, 263 U. S. 629, (1923) at p. 635:

> "The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation and effect of process, and the prescribing of forms, modes and times for proceedings. Most rules are merely a formulation of the previous practice of the courts. Occasionally, a rule is employed to express in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions. But no rule of court can enlarge or restrict jurisdiction. *Nor can a rule abrogate or modify the substantive law.* This is true, whether the court to which the rules apply be one of law, of equity or of admiralty. It is true of rules of practice prescribed by this court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred." (Italics supplied.)

The difficulty of determining whether or not a particular matter is delegable by Congress to the courts was noted in the *Wayman* case, where Mr. Chief Justice Marshall used the terms "judicial" and "exclusively legislative" to describe what may and what may not be delegated. Neither he nor the other judges in the three early cases cited above used the word "procedure," and that word was not used in the statutes considered in those cases. More recently the word "procedure" has been used to describe the sub-

ject-matter over which the power to make rules may be delegated to the courts. Of the many quotable examples, see *Rules of Court Case*, 204 Wis. 501, 236 N. W. 717 (1931) where the opinion (p. 505) speaks of the "power to regulate procedure" as judicial. And the term "substantive law" is often used, as in the quotation above from the *Washington-Southern Navigation Company* case, to describe what may not be dealt with by court rule—*i. e.* what may not be delegated by the legislature to the courts. The determination of whether a particular matter involves "procedure" or "substantive law" is frequently difficult. Mr. Justice Reed noted recently in *Erie Ry. Co.* v. *Tompkins*, 304 U. S. 64, 92 (1938) that "'the line between procedural and substantive law is hazy.'" The difficulty is aggravated by the fact that these terms are used as criteria in other fields of the law. See Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 Yale L. J. 333 (1933), where the distinction is noted as being used to determine whether the law of the forum or some other law governs, to determine whether or not a statute violates the *ex post facto* clause of the Constitution, to determine whether or not the legislature intended a statute to be given a retrospective effect, etc.

Judicial decisions determining that a particular matter is "procedural" or "substantive" with reference to one type of problem are not likely to aid in solving another type of problem. The verbal criteria provided by these words tend to obscure the true function of the rules of law sought to be applied. For this reason, no attempt is made in this brief to apply to the problem at hand the judicial decisions that there may be in other fields of the law with reference to the terms "substance" and "procedure," although a few cases of this kind are necessarily mentioned to indicate an approach to the problem.

The definition of "procedure" most often quoted is that in the opinion of Mr. Justice Miller in *Kring* v. *Missouri*, 107 U. S. 221, 231 (1882):

> "The word *procedure*, as a law term, is not well understood, and is not found at all in Bouvier's Law Dictionary, the best work of the kind in this country. Fortunately a distinguished writer on criminal law in America has adopted it as the title to a work of two volumes. Bishop, Criminal Procedure. In his first chapter he undertakes to define what is meant by procedure. He says: 'S.2. The term procedure is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, pleading, evidence and practice.' And in defining practice, in this sense, he says: 'The word means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in;' and evidence he says, as part of procedure, 'Signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted.' "

Many definitions of "substantive law" are of the same effect as that found in Black's Law Dictionary, (2nd Ed.) 1910:

> "That part of the law which creates, defines, and regulates rights, as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion."

Both definitions indicate the broad scope of these terms. They are so broad that they seem clearly to overlap. "Procedure" includes "pleading, evidence, and practice"—the

entire course of a legal proceeding. That the rule-making power covers this field was indicated by Mr. Justice Story in the *Beers* case cited above, although the word "procedure" was not used. "Substantive law" deals with "rights." Does the field of "rights" excluded from the rule-making power include only the rights that determine the outcome of litigation, the ultimate rights sought to be adjudicated by the litigants? It was apparently rights of this character that Mr. Justice Brandeis had in mind in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78 (1938), in speaking of "substantive rules of common law" which Congress has no power to declare as applicable in a state. Clearly Congress may not delegate to the courts the power to declare by rule what rights of this character exist.

There are also important rights of another character. Procedural devices may invade or affect human rights that the common law has long sought to protect. It is arguable that the doctrine of the separation of powers alone, apart from other constitutional limitations, forbids Congress to delegate rule-making power as to a procedural device of this character, even though it does not involve rights that determine the outcome of litigation. Avoiding the terms "procedure" and "substantive law," this question involves a consideration of whether the particular matter is "exclusively legislative" or "judicial."

This consideration in turn involves the function in our legal system of the power of courts to make rules. In *Wayman* v. *Southard*, 10 Wheat. 1, 43 (U. S. 1825), Mr. Chief Justice Marshall indicated the function of the rule-making power, when, after mentioning the enactment of "general provisions" by the legislature, he referred to the "power given to those who are to act under such general provisions *to fill up the details.*" The chief reason given

for the promulgation of rules by the courts rather than by the legislature is that the legislature does not have the time or specialized knowledge required for the preparation of a detailed code of practice. Thus it has been said by one who has played a large part in the movement for procedural reform by extension of the rule-making power that the legislature should only prescribe the general lines to be followed, leaving the court to work out detailed regulations by rule. See Roscoe Pound, *Some Principles of Procedural Reform*, 4 Ill. Rev. 388 (1909), at page 403:

> "A Practice Act should deal only with the general features of procedure and prescribe the general lines to be followed, *leaving details to be fixed by rules of court*, which the courts may change from time to time as actual experience of their application and operation dictates." (Italics supplied.)

If a particular matter involves a detail of practice with which a court is more familiar than the legislature, the matter seems to be within the delegable rule-making power. But if the matter involves a general principle or a question of public policy that the legislature is able to pass on (and perhaps which can be most effectively considered in a forum where there are opportunities for full debate), the matter should not be dealt with by a rule of court but by a legislative enactment. This criterion makes it possible to avoid the possibly misleading terms "substantive law" and "procedure." At the same time it is more accurate than the verbal criteria provided by those terms, because a matter of procedure may involve a broad policy that seems to be within the exclusive competence of the legislature.

Obvious examples of procedural devices that affect important rights and so involve broad questions of policy are those that violate constitutional limitations, such as the due process clause. Another illustration involving a con-

stitutional guaranty is found in a case already cited, *Kring* v. *Missouri*, 107 U. S. 221 (1882), where the definition of procedure quoted above is found. It was contended there that a law passed after a criminal offense was not invalid *ex post facto* legislation because the change made by the law was merely in "criminal procedure." Mr. Justice Miller indicated that the word "procedure" did not furnish the determining criterion (p. 232):

> "And can any substantial right which the law gave the defendant at the time to which his guilt relates, be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot."

There are rules of evidence that do not involve rights guaranteed by the constitution but that do involve important questions of public policy. Common law privileges and inhibitions against testifying—such as the disability of a party to testify or the disability of one spouse to testify for or against the other—are a part of the law of evidence and so within the field of "procedure." Yet the question of whether or not they should have a place in our legal system is of great public interest, is an important question of public policy. May Congress delegate to the courts the power to determine this question by the promulgation of a court rule?

Whether or not courts should have the power to render declaratory judgments involves the basic purposes of the judicial system. Yet in *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240, the operation of the Declaratory Judgment Act was characterized by Mr. Chief Justice Hughes as "procedural only." Surely this does not mean that the courts may decide by the making of a rule that declaratory judgments may or may not be rendered. If so, it

would seem that the Federal Rules of Civil Procedure could have forbidden this remedy recently provided by the Declaratory Judgment Act (Act of June 14, 1934, 48 Stat. 955, 28 U. S. C. Sec. 400).

This line of argument would seem to indicate that there are "procedural" matters that involve such broad and important questions of policy that the power to make rules about them may not be delegated by Congress to the courts under the doctrine of the separation of powers. However, in the instant case it is not necessary to pursue this line further in view of the language of the Rules Enabling Act. It may be that the doctrine of the separation of powers does not forbid Congress to delegate to this Court the power to decide by rule whether or not a plaintiff may be compelled in a federal court to submit to a physical examination. But it is contended here that Congress has not in fact delegated the power by the Rules Enabling Act.

(2) *The limitation contained in the Rules Enabling Act.*

The Rules Enabling Act (quoted in full in this brief at p. 11) granted the power to make rules in actions at law (as in the case at bar) in the following language:

> "Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the *practice and procedure* in civil actions at law. *Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.*" (Italics supplied.)

The first sentence gives the Supreme Court power to prescribe "practice and procedure" by rules. The second sentence says that the rules shall not "abridge . . . the substantive rights of any litigant." The second sentence seems clearly to have been intended as a limitation on the grant of power in the first.

The fact that the second sentence was used seems to indicate that Congress believed that a rule of procedure could affect substantive rights. As noted above (p. 22) "procedure" is a broad term, including pleading, evidence, and practice, and "substantive law" and "substantive rights" are also broad terms. "Substantive law," it may be, is most commonly used to denote those ultimate rights which determine the outcome of litigation. But as noted above there are other important rights that may be affected by procedural devices, rights that involve questions of public policy. Apparently Congress believed that, since procedure may extend to the line where "substantive law" (*i. e.* the rights determinative of litigation) begins, it was desirable for it not to delegate to the Court the power to make rules that abridge, enlarge, or modify important rights that are involved in some matters of procedure. It is significant that the Rules Enabling Act uses the words "substantive rights" rather than "substantive law."

If rules of "procedure" could not be construed to involve "substantive rights," there was no need for the second sentence in the Rules Enabling Act and the second sentence would be surplusage. Common as is the fault of wordiness in legislative drafting, it seems unlikely that such emphatic and mandatory language as that in the second sentence was merely a draftsman's flourish. It seems

rather that the second sentence was intended to be an important limitation on the broad grant of power in the first.

Another interpretation was placed on the Rules Enabling Act in an article on the rule-making power under the Act by Professor Edson R. Sunderland (*Character and Extent of the Rule-making Power granted U. S. Supreme Court and Methods of Effective Exercise,* 21 A. B. A. Journ. 404, 1935). Professor Sunderland pointed out the difficulty that has existed in numerous different types of problems in drawing a distinction between "pleading, practice, and procedure" and "substantive rights." He concluded his discussion of what is included in the term "procedure" as follows (p. 406):

> "If this interpretation of the scope of procedure is approved, the new federal rules may include the right to use, and the manner of using, every proceeding, operation, expedient, or device capable of contributing to the progress of the cause, from the beginning to the end of the litigation, including mesne and final process and every type of auxiliary remedy, but *they should not deal in any way with the character of the rights which are to be determined by the final judgment.*" (Italics supplied.)

This statement seems to overlook the possibility that there are substantive rights in addition to "the rights which are to be determined by the final judgment." A similar interpretation was apparently placed on the Rules Enabling Act by Mr. William D. Mitchell, the Chairman of the Advisory Committee appointed to assist this Court in promulgating the rules. Speaking in Cleveland, he indicated his belief that the second sentence in the Act was "surplusage." *Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute,* Cleveland, 1938, p. 182.

In addition to the arguments already made, a consideration of the consequences of interpreting the Rules Enabling Act as giving this Court power to regulate the broad field of "procedure" without any limitations (except, of course, those imposed by the Constitution) indicates that the intention of Congress was otherwise. Some of the consequences would be: since "procedure" includes evidence, this Court could construct by rule a complete system of the law of evidence; not only could common law privileges and inhibitions against testifying be removed by rule, but new privileges and inhibitions could be added; this Court could impose by rule a privilege on communications between patient and physician that could be claimed in federal courts sitting in states where, as in Illinois, there is no such privilege; also, as noted above (pp. 25-6), this Court could perhaps repeal the Declaratory Judgment Act.

It is true that Congress retained a measure of surveillance over the rules to be made pursuant to the Rules Enabling Act, the second paragraph of which required the united rules for cases in equity and action in law to be reported to Congress. It is also true that the grant of power to make rules was very broad and that it is desirable that the power should be broad. But the language of the Rules Enabling Act, when considered in the light of the separation of powers, seems clearly to forbid the modification by rule of rights which, though lying within the field of "procedure", involve important questions of public policy.

Thus, even though compliance by the plaintiff with an order directing her to submit to a physical examination does not in theory have a determinative effect upon the right sought to be adjudicated in the litigation, her "substantive" rights as Congress used the term may nevertheless be abridged if she is compelled to comply with the order.

B. Decisions of This Court Indicate that an Order for a Physical Examination Modifies Substantive Rights.

This Court has rendered decisions in two cases involving an order against a litigant to submit to a physical examination. The first case held that a federal court in Indiana had no power to enter the order. The second case held that a federal court in New Jersey (where a state statute provided for the order) did have power to enter the order. Both cases show clearly that such an order involves substantive rights. The importance of these cases requires a detailed analysis of them.

The first case was *Union Pacific Railway Company* v. *Botsford*, 141 U. S. 250 (1891). An action for damages for personal injuries caused by the defendant's alleged negligence was tried in a federal court in Indiana. The defendant made a motion before the trial for an order to direct the plaintiff to submit to a physical examination. The trial court overruled the motion on the ground that the court had no power to make and enforce the order. After verdict and judgment for the plaintiff, the defendant sued out a writ of error to the Supreme Court, where the judgment of the trial court was affirmed.

The opinion of Mr. Justice Gray stated emphatically that the question involved an important "right" of the plaintiff (pp. 251 and 252):

> "*No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint* or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's

person may be said to be a right of complete immunity: to be let alone.' Cooley on Torts, 29.

"For instance, not only wearing apparel but a watch or a jewel, worn on the person, is, for the time being, privileged from being taken under distress for rent, or attachment on mesne process, or execution for debt, or writ of replevin. 3 Bl. Com. 8; *Sunbolf* v. *Alford*, 3 Mees. & W. 248, 253, 254; *Mack* v. *Parks*, 8 Gray, 517; *Maxham* v. *Day*, 16 Gray, 213.

"*The inviolability of the person is as much invaded by a compulsory stripping and exposure, as by a blow.* To compel anyone, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country." (Italics supplied.)

After discussing a limited group of cases in which the early English courts ordered physical examinations, the opinion stated (p. 253) that the English courts had never entered orders for a physical examination in tort cases:

"So far as the books within our reach show, no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history."

The opinion indicates that in a civil action a person may not be compelled to expose his body *at the trial.* Counsel

in the case had argued that, since a party may exhibit his wounds to the jury to enable a surgeon to testify, the court could compel an examination. The opinion answered (p. 255):

> "But the answer to this is, that anyone may expose his body, if he chooses, with a due regard to decency and with the permission of the court; but that he cannot be compelled to do so, in a civil action, without his consent."

Mr. Justice Gray discussed decisions of state courts (some had denied an order for the physical examination of the plaintiff in an action for a personal injury and others had granted the order) and concluded: "On mature advisement we retain our original opinion that such an order has no warrant of law" (p. 256).

The court held that the question was not governed by the Conformity Act. The trial was held in a federal court in Indiana and the opinion stated (p. 256) that opinions of the highest court of Indiana were "conflicting and indecisive" on the question. There was no statute in Indiana that specifically permitted an order for a physical examination. The opinion then continued (p. 256):

> "But this is not a question which is governed by the law or practice of the State in which the trial is had. It depends upon the power of the national courts under the Constitution and laws of the United States."

And after speaking of the power of discovery or inspection conferred upon courts by Congress, the opinion said that section 914 of the Revised Statutes (this is the Conformity Act, 28 U. S. C. sec. 724) "neither restricts nor enlarges the power of these courts (the courts of the United States) to order the examination of parties out of court."

The *Botsford* case thus holds unequivocally that an order directing a litigant to submit to a physical examination abridges and modifies a substantive right. It is true that the word "substantive" was not used. But the right to be free from physical restraint was termed a "right," was characterized as "sacred," and no right was said to be "more carefully guarded by the common law." It is difficult to conceive of language that would more emphatically indicate a right to be substantive.

The decision in the *Botsford* case was followed in a Massachusetts case in which the opinion was written by a former Justice of this court. In *Stack* v. *N. Y. etc. Railroad*, 177 Mass. 155, 58 N. E. 686 (1900), it was held that the trial court did not have power to compel the plaintiff in an action for damages for personal injuries to submit to a physical examination. The opinion of Mr. Justice Holmes, who was then Chief Justice of the Massachusetts court, contained the following language (p. 157, citing the *Botsford* and other cases):

> "* * * we agree with the Supreme Court of the United States, the New York Court of Appeals, and some other able courts, that the power does not exist. * * * But if the power should be deemed needful to a more perfect administration of justice, the remedy should be furnished by the Legislature, which as yet has not gone so far. * * * We cannot doubt that as matter of history the power which we are asked to assert was of a kind rarely claimed or exercised by common law courts. * * * It also is true, perhaps with some reservations, as observed by Mr. Justice Gray in the Supreme Court of the United States, that *the common law was very slow to sanction any violation of or interference with the person of a free citizen.* The few and obsolete cases in which the judges or

a jury inspected the person of a party have little bearing on the court's power to order him to submit to inspection in order to qualify a witness."

(at p. 158):

"* * * And, if that be material, we are not aware that the English Chancery ever has made such an order as was asked here (an order to compel plaintiff to submit to a physical examination). * * * In the present case we perceive no such pressing need of our anticipating the Legislature as to justify our departure from what we cannot doubt is the settled tradition of the common law to a point beyond that which we believe to have been reached by equity, and beyond any to which our statutes dealing with kindred subjects ever have seen fit to go. It will be seen that we put our decision not upon the impolicy of admitting such a power, but on the ground that *it would be too great a step of judicial legislation to be justified by the necessities of the case.*" (Italics supplied.)

This opinion of Mr. Justice Holmes verified what was said in the *Botsford* case on the questions of legal history there involved. Also, it indicates that the English Court of Chancery, extensive as was its power of discovery, did not compel a party to submit to a physical examination.

The second case in this Court was *Camden & Suburban Railway Company* v. *Stetson*, 177 U. S. 172 (1900). It held that a federal court sitting in a state where a state statute provided for an order for a compulsory physical examination could order a physical examination under the Rules of Decision Act. The plaintiff, a citizen of Pennsylvania, sued a corporation in New Jersey for damages for personal injuries caused by an allegedly negligent act that occurred in New Jersey. A New Jersey statute provided that the plaintiff could be ordered to submit to a physical

examination in an action for damages for personal injuries. Before the jury was impaneled the defendant's counsel asked in open court that the plaintiff submit himself to a physical examination. The plaintiff did not consent and the trial court ruled that it had no power to order the examination. On review of the case by the Circuit Court of Appeals, the following question was certified to the Supreme Court: "Had the circuit court the legal right or power to order a surgical examination of the plaintiff?" The question was answered in the affirmative.

At the outset of the opinion Mr. Justice Peckham reaffirmed the holding of the *Botsford* case, but distinguished it on the ground that a state statute was not there involved (p. 174):

> "It is settled in this court that no power to make such an order exists at common law; in other words, the court has no inherent power to make it. *Union P. R. Co.* v. *Botsford*, 141 U. S. 250, 35 L.ed. 734, 11 Sup. Ct. Rep. 1000. In that case there was no statute of the state in which the United States court was held which authorized the order. There is no intimation in the opinion that a statute of a state directly authorizing such examination would be a violation of the Federal Constitution, or invalid for any other reason."

And a federal statute was quoted as making the state statute operative:

> "In this case we have such a statute, and by section 721 of the Revised Statutes of the United States it is provided that 'the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in courts of the United States, in cases in which they apply.'"

Section 721 of the Revised Statutes is the statute known as the Rules of Decision Act (sec. 34, Judiciary Act of 1789; 28 U.S.C. sec. 725). The opinion (p. 174) said that the New Jersey statute did not involve a question of general law which a federal court was not compelled to follow under the doctrine of *Swift* v. *Tyson*, 16 Pet. 1 (1842):

> "The statute concerns the evidence which may be given on a trial in New Jersey, and it does not conflict with any statute of the United States upon that subject. It is not a question of a general nature, like the law merchant, but simply one concerning evidence based upon a local statute applicable to actions brought within the state to recover damages for injury to the person. The statute comes within the principle of the decisions of this court holding a law of the state of such a nature binding upon Federal courts sitting within the state. *Swift* v. *Tyson*, 16 Pet. 1, 18, 10 L.ed. 865, 871; *Nichols* v. *Levy*, 5 Wall. 433, 18 L.ed. 596; *Watson* v. *Tarpley*, 18 How. 517, 520, 15 L.ed. 509, 511; *Ex parte Fisk*, 113 U.S. 713, 28 L.ed. 1117, 5 Sup. Ct. Rep. 724."

The opinion said that the New Jersey statute did not violate the Federal Constitution (p. 175):

> "We are not aware of any reason why this law of the state does not apply to courts of the United States under the section of the Revised Statutes above quoted. There is no claim made that the statute violates the Federal Constitution, and we are of opinion that such a claim would have no foundation, if made."

Mr. Justice Peckham again distinguished the *Botsford* case and pointed out how the Rules of Decision Act, in connection with the New Jersey statute, permitted an order for a physical examination (p. 175):

"We do not dispute that if there were no law of the United States which, in connection with the state law, could be referred to as in effect providing for the exercise of the power, the court could not grant the order under the decision in the case of Botsford. But we say there is a law of the United States which does apply the laws of the state where the United States court sits; and where the state has a law which provides for the making of an order for the examination of the person of a plaintiff in a case like this, the law of the United States applies that law to cases of such a nature on trial in Federal courts sitting in that state. In the *Botsford* case there was no state law, and consequently no foundation for the application of the law of the United States."

And after again re-affirming the *Botsford* case, the opinion concluded (p. 177):

"But by reason of the statute of New Jersey, in which state this action was brought, there being no law of Congress in conflict therewith, we hold that the courts of the United States therein sitting have the power, under the statute and by virtue of sec. 721 of the Revised Statutes of the United States, to order the examination of the person of the plaintiff * * *".

The opinion of Mr. Justice Peckham in the *Stetson* case thus indicated clearly that the Court did not there modify the holding in the *Botsford* case that an order for a physical examination invades a substantive right of a litigant and that a federal court had no power to enter the order in the absence of a federal statute. As noted above, the opinion in the *Botsford* case intimated that the Conformity Act did not govern the question. This intimation was affirmed by the decision in the *Stetson* case. The *Stetson* case held

clearly that the Rules of Decision Act, and not the Conformity Act, was the federal statute that authorized the federal court to apply the state statute.

The Conformity Act deals with "practice, pleadings, and forms and modes of proceeding" (Rev. Stat. sec. 914; 28 U.S.C. sec. 724), language that seems very close to what is commonly understood by the word "procedure". On the other hand, the Rules of Decision Act has always been considered to deal with substantive law or substantive rights. In the first case construing the Act, Chief Justice Marshall said that it "has no application to the practice of the court. * * *" (*Wayman* v. *Southard*, 10 Wheat, 1, 26; 1825). Recent text-writers speak of the Act as governing substantive law or substantive rights. "This statute refers only to substantive law and has no application to procedure in federal courts" (3 Foster, *Federal Practice*, 6th ed., 1921, p. 2448). "Again, the statute refers to state statutes governing substantive rights; it does not apply to state statutes of procedure" (Dobie, *Federal Procedure*, 1928, p. 560).

Had the *Stetson* case applied the Conformity Act, there would have been an indication that this Court considered the question of compulsory physical examination to be only a matter of practice, and so one that could be dealt with in the Federal Rules of Civil Procedure. This is apparent from the fact that the Advisory Committee's note to Rule 35 stated that in the *Stetson* case the state statute was "made operative by the conformity act" (this curious error is discussed in this brief at pp. 49-50). But in fact the Rules of Decision Act was applied in the *Stetson* case, indicating clearly that this Court has held the question of compulsory physical examination to involve the substantive rights of the litigant.

Another aspect of the *Stetson* case seems to be misconstrued in the opinion of the Circuit Court of Appeals in the instant case. The opinion says (R. 17) that the language of the opinion in the *Stetson* case indicates that the right to be free from a compulsory physical examination is not substantive. The language relied on is as follows:

> "It is not a question of a general nature, like the law merchant, but simply one concerning evidence based upon a local statute applicable to actions brought within the State to recover damages for injury to the person."

The context shows clearly that Mr. Justice Peckham was merely saying that the question involved was not one of those questions of general law as to which a federal court was not bound to follow the decisions of state courts under the doctrine of *Swift* v. *Tyson*. So to classify the question does not mean that it is not "substantive"; it merely means that it is not one kind of "substantive" rule.

C. The Substantive Character of the Right Modified by Rule 35 Is Indicated by the Questions of Legislative Policy Involved in the Promulgation of the Rule.

The considerations of policy involved in the determination to grant or not to grant courts the power to compel a physical examination are of such a nature that the granting of the power is a "substantive" matter which Congress did not intend to delegate to this Court.

It has been noted above in this brief (p. 24) that courts are given the rule-making power because of their familiarity with details of practice, while the determination of broader questions of public policy rests with the legislature. The question of whether or not the federal courts should have the power to order a physical examina-

tion presents questions of public policy for decision. It is not a matter of "filling in details". If Congress passed a statute granting the power to the courts, this Court could be given authority to "fill in details" by providing by rule how the order may be obtained, what use may be made of the examiner's report, etc. But the determination of the broad general question of granting or not granting the power is clearly within the competence of Congress. And it would seem that Congress did not intend to delegate the determination of this type of question to the Court in the Rules Enabling Act.

This case involves the validity of Rule 35 and not its desirability. But the arguments for and against the rule indicate that its promulgation presented either a legislative question or a question the determination of which would modify, enlarge, or abridge "substantive" rights.

The arguments *for* granting the power to courts have been stated in a number of judicial opinions of state courts which have held, contrary to the holding in the *Botsford* case, that a court had inherent power to compel a physical examination in the absence of a statutory provision. These arguments are: actions for damages for personal injury are often attempted to be sustained by malingering and false testimony; the discovery of truth in the courts is of greater importance than any merely personal considerations; the courts should not be deterred by false delicacy, as was the Supreme Court in the *Botsford* case, from taking such measures as common sense requires for determining the truth; in seeking redress from a court for a personal injury the plaintiff should be compelled to submit the injury to expert examination. These arguments are made in 4 *Wigmore on Evidence* (2d ed. 1923) sec. 2220, p. 728 *et seq.*, where a number of cases are cited with quotations from the opinions.

The arguments *against* granting the power involve the practical aspects of Rule 35. There is of course the invasion of the person of the plaintiff by an examiner not of the plaintiff's own choosing, for which there was held in the *Botsford* case to be no precedent in the common law. Also, the practical aspects of the trial of personal injury cases indicate the desirability of proceeding cautiously with the granting of the power to the courts.

Defendants do not seek to have the judge appoint a medical expert to examine the plaintiff merely for purposes of discovery—perhaps the chief reason for seeking the examination is to qualify a witness for testifying at the trial. All that the plaintiff and the plaintiff's physician know about the plaintiff's injuries can be discovered by the defendant by the taking of depositions under Rule 26. A physician appointed by the court comes before the jury bearing the stamp of court approval of his impartiality and skill (it has already been held under Rule 35 that an examining physician appointed under the rule becomes an officer of the court. *The Italia* (D.C. N.Y. 1939) 27 F. Supp. 785). In the uncertain field of medical diagnosis and prognosis disagreement among the experts is notorious. Yet the testimony of one expert—the physician appointed by the judge—is bound to carry almost as much weight with the jury as a pronouncement by the judge himself.

One reason for caution is the difficulty of obtaining skilled and impartial physicians who can be relied on to make careful examinations. And the examination is likely to be brief, at least in comparison to the examination made by the attending physician who testifies for the plaintiff. Judges are likely to appoint a physician named by the defendant. Although the judge gives the plaintiff an opportunity to object to the appointment of a physician

named by the defendant, the plaintiff may not know facts that make his appointment undesirable, such as his frequent employment by defendants or his lack of knowledge of the particular field of medicine involved. It is very easy for a physician who is biased or merely uninformed to make an inaccurate report. Also, there is no provision in Rule 35 for the payment of the appointed physician, as indeed it would have been difficult to do unless it had been provided that the person seeking his appointment—*i.e.*, the defendant—pay him. This, of course, will be the result under the rule. And since the physician is paid by the defendant (and perhaps nominated by the defendant) —although he testifies as a court official—his report is likely to favor the defendant's side of the case.

While it is true, as Mr. Wigmore and the judges in the cases cited by him say, that fraudulent claims of personal injury are sometimes made in the courts, it is also true that defendants sometimes resort to unscrupulous tactics to avoid liability for just claims or to decrease the amount of damages. The possibility of having physicians appointed to examine plaintiffs under the rather free provisions of Rule 35 will give unscrupulous defendants opportunities to destroy and weaken valid claims. The danger in this possibility may easily outweigh the benefits expected to be derived from Rule 35 in exposing fraudulent claims, for which, of course, there are many other devices available.

These arguments against the desirability of Rule 35 indicate that the promulgation of the rule involved the determination of important questions of public policy.

Another consideration of policy is that Rule 35 (and it seems to be unique among the rules in this respect) benefits entirely only one group of litigants—defendants who are

resisting claims arising from personal injuries. And similarly Rule 35 discriminates against another group—the plaintiffs who have claims for personal injuries. The arguments against the rule indicate that it can easily give defendants unfair advantages. Its importance to this group of litigants is apparent from an article entitled "New Federal Rules of Civil Procedure and Defense of Tort Actions Covered by Casualty Insurance," 25 A.B.A. Jour. 348 (April, 1939) where (p. 349) the first step suggested under the rules is the procuring of an order under Rule 35. Whether or not this group of litigants should be given the advantages of a physical examination of the plaintiff and of testimony by a court officer seems to involve a question of policy for the legislature to determine.

Another consideration of policy arises from the relationship of the federal to the state courts. Should the federal courts have the power to compel plaintiffs to submit to physical examinations in states where the state courts do not have this power? This seems to be a matter of policy for Congress to decide, particularly since in at least one state—Illinois (see the cases noted in this brief at pp. 13-15)—the decisions indicate a strong policy against compelling physical examinations. Also, an increase in the number of cases removed to the federal courts as a result of the rule seems likely, thus presenting a question of policy for Congress to decide. There are a number of states in which the courts have refused to order a physical examination and in which no statute permits the order. See 4 *Wigmore on Evidence,* cited above in this brief at p. 12. Among them are large industrial states such as Illinois and Massachusetts. Since Rule 35 benefits solely the defending side in litigation, defendants in personal injury and disability insurance cases are likely in almost every case to seek removal to a federal court from a state

court which does not have the power to order a physi
examination. The procedural advantages of the otl
rules over unreformed state procedure benefit equally t
plaintiff and the defendant, so that they do not make
particularly desirable for one party or the other to res
to a federal court. If one party removes the case, t
other will also receive the benefits of the rules. But Ru
35 is useful only to a party defending against a claim.

It seems unlikely that Congress in passing the Rul
Enabling Act intended to delegate to this Court the d
termination of the questions of public policy noted abo
The character of these questions indicates that Rule
involves the "substantive rights" of litigants.

D. Comparison of Rule 35 with Other Rules.

Of the eighty-six Federal Rules of Civil Procedure, Ru
35 is unique in several important respects. No other ru
authorizes the invasion of a right that this Court has call
"sacred," as in the *Botsford* case. No other rule benef
so obviously one class of litigants alone. No other ru
applicable to actions at law presents questions of pub
policy which seem to be so clearly within the competen
of Congress.

Rule 35 is grouped with Rules 26 to 37 in Title V of t
Rules under the heading "Depositions and Discovery
While Rule 35 may seem superficially to involve merely
question of discovery, in fact it differs markedly from t
other rules in Title V.

In one aspect the other rules in Title V represent
mere shifting of a device for obtaining facts from o
stage of the proceeding (the trial) to an earlier sta
Rule 26 permits the taking of depositions before trial "f
the purpose of discovery." Rule 33 provides a meth

by which one party may obtain the answers of another party to written interrogatories. And Rule 34 makes it possible for a party to obtain the discovery and production of documents and things for inspection, copying, or photographing. These rules, in so far as they make innovations in federal practice, merely permit a litigant to obtain *before trial* the discovery of matters that have always been provable at the trial by testimony obtainable by a *subpoena ad testificandum* or a *subpoena duces tecum*. This shift does not involve a change in substantive rights. Also, litigants have been able to obtain in equity some of the same remedies that are provided by Rules 26, 33, and 34, which thus do not effect a change in rights. On the other hand, the opinion in the *Botsford* case (as noted above in this brief at p. 31) indicated clearly that a court could not compel a litigant to expose his body at the trial for examination either by the jury or by medical experts. Thus, Rule 35, in providing a method of physical examination *before trial*, would permit what has not been heretofore permitted at the trial or at any other stage of the proceeding. Also, as pointed out by Mr. Justice Holmes in the *Stack* case (quoted above in this brief at p. 34), an order for a physical examination was not procurable in equity. These considerations show clearly why Rule 35 may be said to abridge substantive rights while Rules 26, 33, and 34 do not.

Also, as a discovery device, Rule 35 is of little value, at least in a court sitting in a state where communications between patient and physician are not privileged (Illinois is one of those states, there being no statute that grants the privilege). By taking the deposition of the plaintiff and the plaintiff's own physician, the defendant is able to discover all that the plaintiff knows about the plaintiff's own case.

Rule 43 is entitled "Evidence." An order for a physical examination may perhaps be classified under this same broad heading; indeed it has been considered to be within the scope of a treatise on evidence, Mr. Wigmore having discussed the subject under the title "Privilege," 4 *Wigmore on Evidence* (2d ed. 1923) 723, sec. 2220. And in *Chicago & N. W. Ry. Co.* v. *Kendall*, 167 Fed. 62 (C. C. A. 8th, 1909), the well-known opinion of Judge Amidon indicated that an order for a physical examination involved the law of evidence. Yet Rule 35 is entirely different in character from Rule 43. Paragraph (a) of Rule 43 deals with the important subject of the admissibility and competency of evidence in federal courts. Evidence is said to be admissible or competent when admissible or competent "under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held." This is merely a sort of conformity provision and does not extend or restrict the rules which heretofore applied. No litigant may therefore complain that a rule of admissibility or competency that may involve substantive rights has been changed to his detriment by Rule 43(a). Thus, the principles which plaintiff contends render Rule 35 invalid do not apply to Rule 43(a).

This comparison of Rule 35 with the other rules that are most similar to it in subject-matter indicates that Rule 35 stands out as a rule of an entirely different character from the other Federal Rules of Civil Procedure. The difference is that Rule 35 more obviously affects substantive rights than the other rules.

E. Conclusion: Rule 35 Abridges the Substantive Rights of the Plaintiff and is Invalid as to the Plaintiff.

The opinions and decisions in the *Botsford* and *Stetson* cases as well as the nature of the questions involved in Rule 35 indicate that the rule modifies substantive rights contrary to the intention of Congress as expressed in the Rules Enabling Act. Insofar as Rule 35 applies to the ordering of a physical examination authorized by the Rules of Decision Act in connection with a state statute or state court decision of the state in which a federal court is sitting, it may not be invalid, since as noted by Mr. Justice Brandeis in the *Washington Southern Navigation Co.* case (cited above p. 20) a rule of court is occasionally employed "to express in convenient form * * *a principle of substantive law which has been established by statute or decisions." But an order for a physical examination is not permitted in the state courts in Illinois either by statute or state court decision. The only federal statute that could be claimed to authorize an order in a federal court sitting in Illinois is the Rules Enabling Act and, as shown by the argument made in this brief, that Act was not intended by Congress to permit the modification of substantive rights.

By its terms Rule 35 would permit a federal court sitting in Illinois to order a physical examination, and it was so construed in this case by the District Court and the Circuit Court of Appeals. To that extent Rule 35 modifies and abridges the substantive rights of the plaintiff and is invalid.

III. The Fact that this Court and Congress Duly Co sidered Rule 35 Does Not Preclude the Plaintiff fro Questioning its Validity, Particularly in View of th Error in the Advisory Committee's Note to the Rul

Rule 35 is perhaps unique among the rules in that prio decisions of this Court had denied federal courts what th rule grants—the power to order a physical examinatio These prior cases were discussed in the *Notes* of the Ad visory Committee appointed by the Supreme Court t assist it in the preparation of the rules. The languag dealing with these cases was as follows:

> "In *Union Pacific Ry. Co.* v. *Botsford,* 141 U. S. 25 (1891), it was held that the court could not order th physical examination of a party in the absence o statutory authority. But in *Camden and Suburba Ry. Co.* v. *Stetson,* 177 U. S. 172 (1900) where ther was statutory authority for such examination, derive from a state statute made operative by the *conformit act* (italics supplied), the practice was sustained. Suc authority is now found in the present rule made opera tive by the Act of June 19, 1934, c. 651, U. S. C., Tit 28, secs. 723b (Rules in actions at law; Supreme Cou authorized to make) and 723c (Union of equity an action at law rules; power of Supreme Court). (*Notes to the Rules of Civil Procedure for the Distric Courts of the United States,* March, 1938, p. 32, pre pared and printed under the direction of the Ad visory Committee on Rules for Civil Procedure.)

The cases cited in the note were commented on in th opinion of the Circuit Court of Appeals in the instan case in the following language:

> "It follows, that regardless of prior court dec sions holding to the contrary, both the Suprem

Court and Congress have construed the right as not being substantive as that term was used in the Enabling Act. If we had any doubt otherwise (which we haven't) that the Supreme Court, in the adoption of the rule in question, was familiar with and considered its prior decisions in *Union Pacific R. R. Co.* v. *Botsford, supra,* and *Camden and Suburban R. R. Co.* v. *Stetson, supra,* that doubt is dispelled by the fact that those two cases were cited and discussed in the notes of the Advisory Committee. (See note following Rule 35, U. S. C. A.) We therefore conclude that the Supreme Court did not exceed the power conferred by Congress and that the rule is valid and has the effect of legislative enactment'' (R. 16).

It is readily conceded that it would be most unfortunate if the Federal Rules of Civil Procedure could be easily invalidated after they have been so carefully prepared by the Advisory Committee and so thoroughly considered by the Court during the various stages of their promulgation. Nevertheless, the fact remains that a rule that abridges or modifies a substantive right is invalid under the Enabling Act, regardless of the action of the Court and Congress.

Also, it is obvious that the fact that the Court and Congress have fully considered the rules imposes a heavy burden on the petitioner in urging the invalidity of Rule 35.

But the importance of this fact is minimized in the case of Rule 35 by the further fact that the note of the Advisory Committee to Rule 35 contains a significant error in its discussion of the *Stetson* case. The note says that the Act of Congress that rendered the state statute operative was ''the conformity act''. It is pointed out above in this brief (pp. 37-8) that the *Stetson* case held, not that the

Conformity Act furnished the necessary statutory authority, but that the *Rules of Decision Act*, in connection with the applicable state statute, permitted an order for a physical examination. It is also pointed out above (p. 38) that the Rules of Decision Act has generally been considered to deal only with substantive rights, and that the Conformity Act has generally been considered to deal with matters of procedure. If the *Stetson* case had applied the Conformity Act, it would show that this Court had held that the matter involved was solely one of procedure. On the other hand, the fact that the Rules of Decision Act was applied indicates that this Court in the *Stetson* case considered an order for a physical examination to involve substantive rights. As a result of the erroneous statement in the note to Rule 35 that the *Stetson* case applied the Conformity Act, anyone reading the note would naturally believe that this Court had considered an order for a physical examination not to involve substantive rights.

The publications of the Advisory Committee do not indicate whether or not the error mentioned above was in the *Notes* of the Advisory Committee when Rule 35 was considered by this Court. The pamphlet containing the Note quoted above was published in March, 1938, which was after this Court had adopted the rules by the order of December 20, 1937 (302 U. S. 783). The report of the Advisory Committee published in April, 1937, did not refer to the *Stetson* case in its note to Rule 35. *Report of the Advisory Committee on Rules for Civil Procedure*, April, 1937, p. 88.

It is apparent, however, that the *Notes* of March, 1938, were available to Congress when it considered the rules. The rules were reported to Congress pursuant to the Rules

Enabling Act early in January, 1938. On May 30, 1938, a joint resolution was introduced to postpone the effective date of the rules and in the Senate the resolution was referred to the Judiciary Committee. 83 Cong. Rec. 4345 (1938). The report of that Committee recommended that the resolution of postponement pass, and asked specifically the question of whether or not several of the rules, including Rule 35, violated "substantive rights". 83 Cong. Rec. 8474-75. The resolution (which was not adopted) and the report of the Judiciary Committee were discussed on the floor of the senate on *June 8, 1938* (83 Cong. Rec. 8473-83), when the *Notes* of March, 1938, were available. The erroneous statement in the note to Rule 35, indicating by its reference to the Conformity Act that this Court had held that an order for a physical examination did not involve substantive rights, was thus before Congress when it considered the rules and failed to postpone their effective date.

The portion of the opinion of the Circuit Court of Appeals quoted above stated that this Court and Congress must have construed the right asserted by the plaintiff here not to be substantive. If this is true, it seems likely that the error in the note to Rule 35, which was not pointed out in the opinion, may have contributed to the construction so made, for the error involved this very crucial question. Certainly the error indicates that this Court should not be reluctant to re-examine the question of whether or not Rule 35 modifies substantive rights.

IV. The Law of Indiana Does Not Furnish Authority for the Order Directing the Plaintiff to Submit to a Physical Examination.

It was argued by the defendant in the Circuit Court of Appeals that the order directing the plaintiff to submit

to a physical examination was supported, aside from Rule 35, by the fact that the alleged tort occurred in the State of Indiana whose courts hold that a court has inherent power to order a physical examination. *City of South Bend* v. *Turner*, 156 Ind. 418, 60 N. E. 271 (1901). The argument was that if an order for a physical examination involves substantive law, the law of Indiana governs. And that under the Rules of Decision Act as interpreted in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), the rule announced by the Indiana courts must be followed by a federal court.

The defect in this argument is that it overlooks the fact that an order for a physical examination is governed by the law of the forum. This is true even if the order involves the "substantive rights" of the plaintiff as contended in Point II of this brief. In Point II it is argued that the order involves "substantive rights" even though it is a matter of "procedure". Certainly it is a matter of "procedure" within the rule that the law of the forum governs procedure.

This is apparent from the *Restatement, Conflict of Laws*, (1934). The rule is stated as follows (sec. 585): "All matters of procedure are governed by the law of the forum." What is meant by the word "procedure" in the rule is discussed at pp. 700-701:

> "A limitation upon the scope of the reference to the foreign law is thus necessary. Such limitation excludes those phases of the case which make administration of the foreign law by the local tribunal impracticable, inconvenient, *or violative of local policy.* In these instances, the local rules at the forum are applied and are classified as matters of procedure." (Italics supplied.)

Thus, the word "procedure" is used arbitrarily in this rule to include what is governed by the law of the forum. And a foreign law "violative of local policy" is not followed under the rule.

It has been pointed out above (pp. 13-15) that there is a strong policy in Illinois against the granting of orders for a physical examination. For this reason, it is inconceivable that an Illinois state court would order a physical examination in a case where the tort occurred in another state where the courts enter orders of that kind. The law of the forum that a federal court applies is the law of the state where the court sits—in this case, Illinois. There is thus no basis for applying the Indiana law.

Another indication that the law of Illinois applies is the fact that an order for a physical examination forms a part of the law of evidence (see authorities cited in this brief, p. 46), to which the law of the place where the suit is brought applies. See *Central Vt. Ry. Co.* v. *White*, 238 U. S. 507 (1915) where Mr. Justice Lamar stated (p. 511):

> "There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of action, sufficiency of the pleadings, *rules of evidence*, and the statute of limitations—*depend upon the law of the place where the suit is brought.*" (Italics supplied.)

That the law of Illinois governs is also apparent from the opinion of this Court in the *Stetson* case (cited above at p. 34). At several points Mr. Justice Peckham indicated that under the Rules of Decision Act it was the statute of the state *in which the federal court was sitting* that authorized the order for a physical examination. See 177 U. S. 175:

> "But we say there is a law of the United States which does apply the laws of the state *where the United*

States court sits; and where the state has a law which provides for the making of an order for the examination of the person of a plaintiff in a case like this, the law of the United States applies that law to cases of such a nature on trial in *Federal courts sitting in that state.*"

And p. 177:

"But by reason of the statute of New Jersey, in which state this action was brought, there being no law of Congress in conflict therewith, we hold that the courts of the United States *therein sitting* have the power, under the statute and by virtue of sec. 721 of the Revised Statutes of the United States, to order the examination of the person of the plaintiff . . ." (Italics supplied.)

Thus, no matter how an order for a compulsory physical examination may be classified in determining whether or not it modifies the substantive rights of a litigant, it is clear that it is classified as a rule of procedure within the rule that the law of the forum governs procedure. The law of Indiana has no bearing on the validity of the order involved in the instant case.

V. Conclusion.

This Court has held that a person has a right not to be compelled to submit to a physical examination. The Illinois courts are committed to the same doctrine. The arguments made in this brief indicate that the right is "substantive". Rule 35 of the Federal Rules of Civil Pro-

cedure, as applied in this case, destroys this right of the plaintiff and thus exceeds the limitation contained in the Rules Enabling Act. And Rule 35 furnishes the only possible ground for the order entered directing the plaintiff to submit to a physical examination. That order is therefore invalid, as is also the judgment of contempt entered for disobedience of the order.

We submit that this Court should take jurisdiction of the case and reverse the decision of the Circuit Court of Appeals.

Respectfully submitted,

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Attorney for Petitioner.

ROYAL W. IRWIN AND
JAMES A. VELDE,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 798 28

HERTHA J. SIBBACH, *Petitioner,*

vs.

WILSON & COMPANY, INC., *Respondent.*

REPLY TO BRIEF OF RESPONDENT.

LAMBERT KASPERS,
Attorney for Petitioner.

ROYAL W. IRWIN and
JAMES A. VELDE,
Of Counsel.

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IN THE

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No. 799.

HERTHA J. SIBBACH,

Petitioner,

vs.

WILSON & COMPANY, INC.,

Respondent.

REPLY TO BRIEF OF RESPONDENT.

SUMMARY OF ARGUMENT.

1. Respondent's brief misstates the contention of petitioner.

2. Respondent does not answer numerous arguments made by petitioner.

3. Conclusion.

ARGUMENT.

1. Respondent's Misstatement of Petitioner's Contention.

Respondent's brief indicates that it does not understand the petitioner's argument. Consequently throughout the

respondent's brief the petitioner's contention is misstated and, as misstated, is readily reduced to an absurdity.

Petitioner's Contention.

Petitioner's contention that Rule 35 is invalid is argued in Point II of petitioner's brief (pp. 18-47). It may be summarized as follows:

A. The right not to be compelled to submit to a physical examination may be a "substantive" right forbidden by Congress to be modified by the Federal Rules of Civil Procedure even though in theory the right is not of the character determinative of litigation (Point A, pages 18-29, petitioner's brief).

B. The decisions of this Court in the *Botsford*[1] and *Stetson*[2] cases indicate that the right asserted is "substantive" (Point B, pages 30-39, petitioner's brief).

C. The questions of legislative policy involved in the promulgation of Rule 35 which modifies the right asserted indicate that the right is "substantive" (Point C, pp. 39-44, petitioner's brief).

Conclusion: Rule 35 modifies a substantive right of the petitioner and is invalid.

This contention of the petitioner does not in itself involve the law of Illinois. But certain excluding distinctions made in petitioner's brief required a description of the Illinois law. These distinctions were made to define the scope of the question presented and to show that the petitioner was in a position to make the contention out-

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[1] *Union Pacific Railway Company* v. *Botsford*, 141 U. S. 250 (1891).

[2] *Camden & Suburban Railway Company* v. *Stetson*, 177 U. S. 172 (1900).

lined above. It was necessary to make these distinctions for the following reasons:

(a) In the *Stetson* case this Court held that the Rules of Decision Act "*in connection with the state law*"[3] may permit a federal court to order a physical examination. The opinion in that case indicated clearly that the state law applied "in connection with" the Rules of Decision Act was "the laws of the state where the United States Court sits".[4] If Illinois were one of those states whose statutes or (under the construction of the Rules of Decision Act made in *Erie R. v. Tompkins*, 304 U. S. 64) court decisions permitted an order for a physical examination, the petitioner would not be in a position to attack the validity of Rule 35. The Rules of Decision Act "in connection with" the Illinois law would permit the order entered in the instant case. And the petitioner could not assert that Rule 35 had modified her right not to be compelled to submit to a physical examination if the Rules of Decision Act had modified the right by making the state law applicable. This distinction was discussed on page 15 of petitioner's brief.

(b) Petitioner feared that, *even assuming Rule 35 to be invalid*, it might seem at first sight that the order appealed from was validated by the Rules of Decision Act "in connection with" the law of Indiana where the alleged tort occurred. To negative this possible argument, petitioner pointed out that the state whose law would be applied "in connection with" the Rules of Decision Act would be, not Indiana, but Illinois.

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[3] The phrase was used by Mr. Justice Peckham in the *Stetson* case, 177 U. S. at p. 175.

[4] 171 U. S. at p. 175.

> The reason is that the question is one governed, not by the law of the place of the injury, but by the law of the place where the action is brought—in other words, by the law of the state where the federal court sits or (to use the expression that seems to have misled respondent) the law of the forum. This point is discussed on page 17 and in Point IV (pp. 51-54) of petitioner's brief.

The frequent references to the Rules of Decision Act in petitioner's brief show clearly that Illinois law was discussed as applicable in the instant case only "in connection with" the Rules of Decision Act.

Respondent's Version of Petitioner's Contention.

At the outset of its brief respondent purports to state petitioner's contention as follows:

> "The asserted invalidity (of Rule 35) is that, there being no *Illinois* statute authorizing the Illinois courts to require a physical examination * * * and that *since the law of the State of Illinois is the law of the forum of the Federal District Court and controls that court in this matter,* the rule in question could not validly authorize the entry of such an order by a Federal District Court sitting anywhere in Illinois". (Respondent's brief, p. 2; italics supplied.)

Such a contention by petitioner would obviously be an absurdity: petitioner is represented as contending that the law of Illinois *apart from any federal statute* must be followed by federal courts in Illinois. This contention is not made in petitioner's brief. The phrase "law of the

forum'"[5] is taken by respondent from one part of petitioner's brief and elevated to the position of petitioner's sole ground for attacking the validity of Rule 35.

Throughout respondent's brief this same misunderstanding of petitioner's argument appears: see page 5 (last two paragraphs), all of pages 10 and 11, Point IV on pages 14-15.

In thus misstating petitioner's contention, respondent omits important aspects of petitioner's argument, making no mention of what is clear from petitioner's brief: the law of Illinois is pertinent in this case only "in connection with" the Rules of Decision Act and only apart from Rule 35. Respondent's statement leaves out the core of petitioner's argument (Point II, pp. 18-47, petitioner's brief) and confuses with it the excluding distinctions discussed above.

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[5] Respondent (brief, pp. 14-15) takes petitioner to task for using the term "law of the forum" to mean the law of the state where a federal court sits. Of course petitioner used "law of the forum" as state law applied under the Rules of Decision Act. Certainly federal courts have long applied some of the law of the state where they sit. In addition to the authorities cited in petitioner's brief (p. 53), see *Conn. Mut. Life Ins. Co.* v. *Union Trust Co.*, 112 U. S. 250, 256 (1884); and Leach, State Law of Evidence in the Federal Courts, 43 Harv. L. Rev. 554, 570: "On any interpretation of the section (Rules of Decision Act), *statutes of the state of the forum relative to admissibility of evidence must be followed in the federal courts in trials at common law*".

2. Arguments of Petitioner Not Answered by Respondent.

(a)

Respondent does not answer petitioner's arguments that the function of judicial rule-making power is to prescribe details of practice and of the legislative power to enact rules involving general principles and questions of public policy (petitioner's brief, pp. 23-24);

that this principle shows that there may be "procedural" matters as to which Congress may not delegate rule-making power to the courts (petitioner's brief, pp. 25-26);

that the limitation in the Rules Enabling Act should be considered in the light of this principle (petitioner's brief, pp. 26, 29);

and that, so considered, the limitation in the Rules Enabling Act was intended by Congress to forbid the modification by rule of "substantive rights" involved in "procedural" matters (petitioner's brief, p. 27).

Although the respondent asserts (see pp. 7 and 15-16, respondent's brief) that the limitation in the Rules Enabling Act was without effect and that "substantive rights" was not used in the act to include rights involved in procedural matters, respondent fails to advance any reason why petitioner's analysis of the limitation is unsound. In fact respondent does not mention petitioner's analysis.

Respondent's assertion means that the limitation is surplusage, the same position taken by Professor Sunderland and Mr. Mitchell as noted in petitioner's brief (p. 28). This interpretation, while giving a broad meaning to "procedure", gives a *narrow* meaning to "substantive rights", restricting them to rights of the character determined by the final judgment. The main authority given by respond-

ent for this narrow interpretation of "substantive rights" is a quotation from Professor Sunderland's article (respondent's brief, p. 16), part of which was quoted by petitioner (p. 28). This and other authorities cited on pp. 16-17 of respondent's brief do not detract from the result of petitioner's analysis of the Rules Enabling Act: when considered against the background of the doctrine of the separation of powers, it is clear that Congress used "substantive rights" as a term of broad meaning.

Respondent does not answer petitioner's argument (p. 29) that the *consequences* of a narrow interpretation of "substantive rights" indicate that Congress intended the term to have a broad meaning in the Rules Enabling Act.

(b)

Respondent does not answer petitioner's contention (pp. 30-33, petitioner's brief) that the emphatic language of this Court in the *Botsford* case indicates that this Court has considered the right here asserted to be "substantive". It may be, as respondent argues (pp. 12-13, respondent's brief), that the right here asserted is not proved to be substantive by the mere fact that the *Botsford* case held legislation necessary to permit violation of the right. But the opinion in the case (as that of Mr. Justice Holmes in the *Stack* case[6]) shows that the right asserted is an important right which the common law has long sought to protect. This is not denied by the respondent.

Respondent does not attempt to answer petitioner's argument (pp. 37-38, petitioner's brief) that the fact that this Court in the *Stetson* case held an order for compulsory

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[6] *Stack* v. *N. Y., etc., Railroad,* 177 Mass. 155, 58 N. E. 686 (1900).

physical examination to be governed by the Rules of Decision Act indicates that the matter is substantive.

(c)

Respondent nowhere denies that important considerations of public policy were involved in the promulgation of Rule 35 and that those considerations indicate that the rule involves substantive rights, as stated in petitioner's brief (pp. 39-44).

Respondent's only mention of this portion of petitioner's argument is to deny that Rule 35 benefits only the defending side in litigation (pp. 17-18, respondent's brief), a fact stated by petitioner to indicate one of the several considerations of policy involved in the adoption of Rule 35. Petitioner re-affirms that Rule 35 benefits only the defending side, since the rule does not contain (and it would be difficult to include in it) the administrative safeguards needed to protect plaintiffs from unskilled and biased examiners.

(d)

Respondent does not deny that Rule 35 modifies substantive rights more obviously than other rules of similar subject-matter (see petitioner's brief, pp. 44-46). There is thus no denial of the fact that orders for physical examination have been classified by high authority as a part of the law of evidence (petitioner's brief, p. 46).

(e)

Respondent does not deny petitioner's contention (petitioner's brief, pp. 48-51) that the error in the Advisory Committee's note to Rule 35 may have contributed to the construction of Rule 35 as not "substantive" which this

Court and Congress may perhaps be deemed to have made. Without mentioning this error respondent (pp. 3-4) merely relates numerous historical facts about the promulgation of the rules and their consideration by Congress,[7] much of which was stated in petitioner's brief (pp. 50-51).

3. Conclusion.

As conceded by petitioner (brief, p. 49) the careful preparation of the Federal Rules of Civil Procedure imposes a heavy burden on petitioner in urging that Rule 35 is invalid. We submit that the respondent's brief does not show that the petitioner has failed to sustain the burden and is not entitled to the relief sought in this proceeding.

Respectfully submitted,

LAMBERT KASPERS,
Attorney for Petitioner.

ROYAL W. IRWIN AND
JAMES A. VELDE,
Of Counsel.

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[7] The respondent says that the *Botsford* and *Camden* (*i. e., Stetson*) cases were "discussed at length" before the Senate, the implication being that Congress considered the same argument here urged by petitioner. Respondent's statement is not supported by the cited pages of the Congressional Record, nor by adjacent pages. The Record (Vol. 83, Part 8) reveals only that the *Botsford* case was cited once in a report of the Judiciary Committee (p. 8475) and three times in statements of witnesses before that Committee (pp. 8480, 8481), both of which were reprinted in the Record by leave, and that the holding of the *Botsford* case was stated by one witness (p. 8481) with the comment: "The reason, as is clearly shown by the opinion, is that it was a substantive right not conferred by Federal statutes". This scarcely amounts to "discussion at length".

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No. 28

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SUMMARY OF ARGUMENT.

1. The limitation in the Rules Enabling Act. (Supplementing Point II, A, pp. 18-47, Brief in Support of Petition.)

2. The questions of policy involved in the adoption of Rule 35 indicate the substantive character of the right modified by the rule. (Supplementing Point II, C, pp. 39-44, Brief in Support of Petition.)

3. The law of Indiana does not furnish authority for the order. (Supplementing Point IV, pp. 51-54, Brief in Support of Petition.)

ARGUMENT.

This brief supplements the argument in Petitioner's Brief in Support of Petition for Writ of Certiorari by the addition of authorities not cited in the earlier brief.

1. The Limitation in the Rules Enabling Act.

(Supplementing Point II, A, pp. 18-47, Brief in Support of Petition.)

Petitioner's analysis of the limitation in the Rules Enabling Act[1] is the same as that of the late Thomas W. Shelton. From 1912 to 1929 Shelton was the chairman[2] of a committee of the American Bar Association that urged that the Supreme Court be given power by statute to adopt rules of civil procedure for actions at law. In writing of a bill[3] that had almost the same text as the Rules Enabling

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[1] Act of June 19, 1934, c. 651, secs., 1, 2 (48 Stat. 1064; 28 U.S.C. 723b, 723c), quoted in full in Petitioner's Brief in Support of Petition, p. 11.

[2] It has been said that Shelton "should be named first in the long list of those who distinguished themselves by persistent devotion to the great cause" of giving the Supreme Court power to make rules for actions at law. (1938) 24 A.B.A.J. 99, in an article setting forth the history of the American Bar Association's effort to obtain this power for the Supreme Court.

[3] Introduced in the Senate (69th Cong. 1st Sess.) in December, 1925 as S. 477. The bill sponsored by the American Bar Association in prior years contained only one sentence (see text of H.B. 26462 introduced on December 2, 1912, reproduced in (1938) 24 A.B.A.J. 101). In 1925 the bill was changed by adding what is now the second sentence—the limitation clause—of the Rules Enabling Act and by adding also what is now Section 2 of the Rules Enabling Act giving the Supreme Court power to unite the rules in cases in equity with those in actions at law. There are two minor verbal differences between the 1925 bill and the Rules Enabling Act.

Act, Shelton emphasized that it would "necessitate no alteration of the present procedure upon any jurisdictional or fundamental matter" and stated that this "simple statute" embodied the following principles underlying the rule-making power:[4]

> * * * "The principle underlying rules of court is the organic one of an equable division of power between the legislative and judicial department of government. It is the very spirit of the Constitution. The program of the American Bar Association proposes to divide all judicial procedure into two classes, viz.:
>
> (a) jurisdictional and fundamental matters and general procedure and
>
> (b) the rules of practice directing the manner of bringing parties into court and the course of the court thereafter.
>
> The first class, of which we shall speak presently, goes to the very foundation of the matter and may aptly be denominated the *legal machine* through which justice is to be administered, as distinguished *from the actual operation thereof,* and lies exclusively with the legislative department of government. It prescribes what the courts may do, who shall be the parties participating, and fixes the rules of evidence and all important and permanent matters of procedure. The second class concerns only the practice, the manner in which these things shall be done, that is, the details of their practical, mechanical operation. Concisely stated the first class provides what the courts *may* do, which power should be by the Legislative Department, while the second regulates *how* they shall do it, which should be within the control of the presiding judges and lawyers."

---

[4] Supplement to March, 1927, A.B.A.J. 5, in an article entitled "*The Philosophy of Rules of Court,*" one of a series of articles by eminent lawyers on the rule-making power of the courts (1927) 13 A.B.A.J. following p. 172.

A report of the Committee on the Judiciary of the United States Senate, in recommending the passage of the 1925 bill written about by Shelton, analyzed the bill in language very similar to that of Shelton.[5] Of the rule-making power granted by the bill, the report said:[6]

> "Where a doubt exists as to the power of a court to make a rule, the doubt will surely be resolved by construing a statutory provision in such a way that it will not have the effect of an attempt to delegate to the courts what is in reality a legislative function. And it is inconceivable that any court will hold that rules which deprive a man of his liberty . . . are merely filling 'up the details', even though they relate to remedial rights."

Both Shelton and the report of the Senate committee attributed real meaning to the limiting words, "Said rules shall neither abridge, enlarge, nor modify the substantive rights of a litigant." Neither took the position that the words were surplusage, or that they meant only that the rules should not deal with the rights determined by the final judgment in the litigation. Both considered the Rules Enabling Act from the standpoint of the function of the rule-making power and avoided the troublesome criteria of "procedure" and "substantive law." Shelton included "important and permanent matters of procedure" in his first class of matters not within the rule-making power.

Petitioner's analysis of the rule-making power is also supported by the views of two writers—Thomas F. Green and Charles A. Riedl—in recent articles[7] entitled "To

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[5] Sen. Rep. No. 1174, 69th Cong., 1st Sess., (1926) 12. At pp. 9-12, the report is devoted to a discussion of the heading, "The Bill does not attempt to affect substantive rights or remedies."

[6] *Id.* p. 11.

[7] Both articles were submitted in the 1940 Ross Essay Competition of the American Bar Association. Green, (1940) 26 A.B.A.J. 482; Riedl, *id.* 601.

What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?" Both writers look to the function of the rule-making power as furnishing the criteria to be followed in deciding what is within the rule-making power. Both conclude that a rule of evidence is not within the rule-making power if it involves an important question of public policy. Mr. Green says[8] of the distinction between procedure and substantive law:

> "The borderline must remain shadowy. Its location will vary somewhat according to the purpose of the classification. When the rule-making power is being defined, the distinction between procedure and substance is drawn for the purpose of giving the judiciary a legislative control of *judicial machinery but not of individual rights.* The distinction cannot be based entirely on the etymology of the two words nor altogether on the meaning given them for other purposes by decided cases. If the court or the legislature recognizes a vested interest of litigants in the particular rule of evidence, the rule is not an adjective precept but an independent right and should not be controlled by rule of court." (Italics supplied.)

He also says that rules of evidence should be held *prima facie* to be procedure *"unless some pressing public policy requires otherwise."* Mr. Ried! says:[9]

> "In establishing the standard within which the court may prescribe rules of evidence under the rule-making power, we should not become slaves to the terms 'substantive law' and 'procedural law.' . . . it is now impossible to determine what is meant by the terms 'substantive law' and 'procedural law.' We therefore do not hesitate to abandon these terms. . . .
>
> " . . . The norm is not whether the rule is enforced as a rule of procedure, but rather whether the rule

[8] *Id.* 484.
[9] *Id.* 604.

creates a non-procedural policy. *If the rule is an expression of general public policy, then it can be prescribed only by the legislature.*" (Italics supplied.)

Thus, even though the content of Rule 35a of the Federal Rules of Civil Procedure may be classified as matter of procedure, it is nevertheless invalid under the Rules Enabling Act if it deals with a "fundamental matter," with "what the courts may do" rather than with "how they shall do it"; if there is a "pressing public policy" that operates against the rule; or if the rule deals with a matter of "general public policy."

In the instant case the opinion of the Circuit Court of Appeals does not attempt to analyze the meaning of the Rules Enabling Act. This is likewise true of the opinion of the Court of Appeals for the District of Columbia in the recent case of *Beach* v. *Beach*,[10] where it was held (Judge Stephens dissenting) that Rule 35a is valid under the Rules Enabling Act. This is likewise true of statements about the Rules Enabling Act in the opinion in *Sampson* v. *Channell*.[11] In language that was unnecessary to the decision of the case, Judge Magruder there said (p. 756) that there is "a twilight zone between the two categories (of procedure and substantive law) where a rational classification could be made either way" and where the Supreme Court under the Rules Enabling Act would have power to prescribe a so-called rule of procedure for the federal courts. Judge Magruder also intimated (p. 757, n. 7) that the terms "practice and procedure" and "substantive rights" were ambiguous and said that, if the Supreme Court adopts a rule in a borderline case, "the courts properly are inclined to adopt the construction put upon the language (of the Rules Enabling

[10] Decided June 28, 1940, No. 7559; 3 Fed. Rules Serv. 35a.5, Case 2, not yet published in Federal Reporter.

[11] 110 F. (2d) 754 (C.C.A. 1st, 1940), *cert. denied* June 3, 1940, 60 S. Ct. 1099.

Act) by the agency charged with carrying out the statute", and that this would be particularly true when the agency happens to be the Supreme Court of the United States. The *Sampson* case did not require an interpretation of the Rules Enabling Act. The reasoning of Shelton and the other authorities cited above, as well as that in Petitioner's Brief in Support of Petition, tends to clarify for the instant case any seeming ambiguity in the Rules Enabling Act and to dispel any "twilight zone" between substance and procedure that the Act may be thought to create.

2. The questions of policy involved in the adoption of Rule 35 indicate the substantive character of the right modified by the rule.

(Supplementing Point II, C, pp. 39-44, Brief in Support of Petition.)

Petitioner's contention that the adoption of Rule 35a required the determination of important questions of policy is supported by the conclusions of Charles A. Riedl in the article already cited. As noted above, Mr. Riedl says that the criterion to apply in deciding whether or not a matter is within the rule-making power is to determine "whether the rule creates a non-procedural policy." To illustrate the criterion, he applies it to twenty proposals made by the American Bar Association's Committee on Improvements in the Law of Evidence.[12] Mr. Reidl lists[13] the proposals and states in each case whether or not the proposal affects "general public policy" and whether it is a matter for the court or the legislature to adopt. Proposal number four of the American Bar Association Committee is the adoption of the Uniform Expert Testi-

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[12] The proposals are set forth in *Report of the Committee on Improvements in the Law of Evidence*, (1938) 63 A.B.A. Rep. 570, at pp. 581-597.

[13] (1940) 26 A.B.A.J. 605.

mony Act[14] prepared by the National Conference of Commissioners on Uniform State Laws. Portions of this proposed Act are similar to Rule 35a of the Federal Rules of Civil Procedure. Section 5 of the Uniform Act provides, among other things, for the making of a physical examination of the person by a court-appointed expert. Mr. Riedl concludes that the Uniform Expert Testimony Act is an expression of "general public policy" and that therefore it should be adopted by legislative enactment rather than by rule of court. He reaches the same conclusion about the American Bar Association Committee's tenth proposal, which urges the psychiatric examination of the complaining witness in sex-offense cases.[15]

In determining whether or not a rule of court involves general public policy, it has been suggested that the attitude of the courts of the state in which the federal court is sitting should be given great weight. The suggestion is made by Judge Charles E. Clark of the Circuit Court of Appeals for the Second Circuit. Judge Clark, who was Reporter to the Advisory Committee that assisted this Court in preparing the Federal Rules of Civil Procedure, recently said:[16]

> ". . . A rule, which obviously has some effect upon substantive rights and just as obviously has to do with the manner in which the case is brought before and presented to the courts, does affect both substance and procedure, and . . . we cannot decide in which

---

[14] The text of the proposed Act appears in (1938) 63 A.B.A. Rep. 598-600.

[15] These conclusions are reached by Mr. Riedl with full knowledge of the fact that this court adopted Rule 35a of the Federal Rules of Civil Procedure. See (1940) 26 A.B.A.J. 605, n. 30.

[16] (1940) 8 Geo. Wash. L. Rev. 1238, in an article entitled *"Procedural Aspects of the New State Independence."*

category it must go for present purposes without weighing other matters of policy. *May it not be sound . . . to try to ascertain how strongly substantive the rule is regarded in the state itself, by its legislature and courts?''* (Italics supplied.)

As already pointed out by petitioner,[17] the decisions of the Illinois courts reveal a strong policy against compelling physical examinations. The cases go so far as to hold, not merely that the courts do not have power to order a physical examination, but that the plaintiff may not be asked at the trial about his or her willingness to submit to the examination.

3. The law of Indiana does not furnish authority for the order.

(Supplementing Point IV, pp. 51-54, Brief in Support of Petition.)

That a federal court may rightly apply some of the law of the state in which the court is sitting, rather than the law of the state where the tort occurred, is apparent from the recent holding in *Sampson* v. *Channell.*[18] In that case an alleged tort occurred in the State of Maine and the trial was in a federal district court sitting in Massachusetts. The Maine law imposed on the plaintiff the burden of proving his freedom from contributory negligence. The Massachusetts law imposed the burden on the defendant. The Circuit Court of Appeals held that the Massachusetts rule should be followed. The opinion said that the incidence of burden of proof was a substantive matter in applying the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), and that a state rule should therefore be followed. But from the standpoint of *what* state law should be fol-

[17] Petitioner's Brief in Support of Petition for Writ of Certiorari, 13-15.

[18] Cited above, note 11.

lowed, the opinion said that the matter was procedural and that, since a Massachusetts state court would apply its own law as to incidence of burden of proof when the tort occurred in Maine, the federal court sitting in Massachusetts should apply the Massachusetts law.

So in the case at bar, even though Rule 35a is invalid because it modifies a substantive right of the plaintiff, a federal court sitting in Illinois may not order a physical examination because the alleged tort occurred in Indiana where the state courts may have that power. On the question of whether the Indiana or Illinois law governs, the ordering of a physical examination is a procedural matter; and the federal court sitting in Illinois follows the Illinois law.

Respectfully submitted,

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JAMES A. VELLZ,
Of Counsel.

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REPLY TO BRIEF OF RESPONDENT AND TO BRIEF OF WILLIAM D. MITCHELL, AMICUS CURIAE.

LAMBERT KASPERS,
Attorney for Petitioner.

ROYAL W. IRWIN and
JAMES A. VELDE,
Of Counsel.

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1. Extent of the Power of the Supreme Court under the Rules Enabling Act.
2. The Adoption of Rule 35 Required the Determination of Broad and Important Questions of Public Policy.
3 The Fact That Congress Permitted the Rules to Become Effective Would not Cure the Invalidity of Rule 35.
4. The Contempt Order and the Disposition to be Made of this Case.

ARGUMENT.

1. Extent of the Power of the Supreme Court under the Rules Enabling Act.

Both respondent and Mr. Mitchell[1] take the position that the Rules Enabling Act authorized the adoption of rules covering the entire field of "procedure", including even procedural matters that involve important and broad questions of public policy. Both assert that the line between substance and procedure is easy to mark.

Petitioner's position is that the extent of the rule-making power should be determined by the function of the power. The distinction to be made is, not between substance and procedure, but between what is legislative and what is judicial. Regardless of the ease or difficulty of applying the criteria of substance and procedure (and the difficulty of applying them has been noted repeatedly), they are not the true criteria. And the true criteria are certainly no more difficult to apply than the false.

Neither the respondent nor Mr. Mitchell mentions the careful analyses[2] of the rule-making power made by Thomas W. Shelton, by the report of the Senate Judiciary Committee in 1925, and by recent writers in the American Bar Association Journal, all cited in the supplemental brief of respondent. These analyses support petitioner's contention that questions about the extent of the rule-making power are not answered by decisions made in other situations that this or that matter is procedural or substantive.

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[1] Brief for the Respondent, pp. 9-12, 24-34; Brief of William D. Mitchell, pp. 12-17.

[2] Quoted in Supplemental Brief of Petitioner, 2-5.

Both respondent and Mr. Mitchell[3] express fears that petitioner's interpretation of the Rules Enabling Act would result in confusion and perhaps invalidate many of the Federal Rules of Civil Procedure. That these fears are exaggerated is shown by the comparison of Rule 35 with other rules similar to it in subject-matter, a comparison made in petitioner's first brief.[4] And petitioner does not take the extreme view (attributed to her by Mr. Mitchell) that the enabling act forbids rules that "affect" substantive rights.

2. The Adoption of Rule 35 Required the Determination of Broad and Important Questions of Public Policy.

Both respondent and Mr. Mitchell[5] argue that it is highly desirable that the courts have power to order physical examinations as provided in Rule 35 of the Federal Rules of Civil Procedure. Similar arguments were summarized in petitioner's Brief in Support of the Petition, and petitioner also gave arguments against the desirability of the power.[6] The arguments on both sides of the question show that it is necessary to decide important questions of public policy in deciding whether or not courts should have the power. How far should the courts be permitted to go in compelling a person to expose his or her body to an examiner not of the person's own choosing? How important is the inviolability of the person? Both respondent and Mr. Mitchell consider a compulsory physical examination only as a means of discovery. Its importance is really much greater: the examiner makes the examination to qualify himself as a witness at the trial rather than merely

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[3] Brief for the Respondent, pp. 34-36; Brief of William D. Mitchell, p. 15.

[4] Petitioner's Brief in Support of Petition, pp. 44-46.

[5] Brief for the Respondent, pp. 37-38; Brief of William D. Mitchell, pp. 20-23.

[6] Petitioner's Brief in Support of Petition, pp. 40-44.

to furnish information useful to opposing counsel in preparing for trial. The examiner's testimony, cursory though his examination is likely to have been, is certain to bear a great weight with the jury, a weight disproportionate to the accuracy of the examination. Thus another question of public policy that must be decided is the extent to which a compulsory examination should be permitted in order to qualify a court officer (the examiner) as a witness.

These questions of policy can and should be decided by the legislature. They require judgments about the present state of the science of medicine, about the inviolability of the person, about the length to which a trial court should be permitted to go in influencing the decision of the jury. The legislature is competent to determine these questions. They are not within the province of a court simply because of its specialized knowledge of court practice.

3. The Fact That Congress Permitted the Rules to become Effective Would Not Cure the Invalidity of Rule 35.

Respondent argues[7] that the inaction of Congress in permitting the rules to become effective when they were reported to Congress amounts to a ratification of any rule that may have exceeded the limitation imposed by the Rules Enabling Act; and that therefore in Rule 35 there is in effect an act of Congress authorizing an order for a physical examination.

This argument overlooks the necessity for the presentation of bills of Congress to the President before they become law, as required by Section 7, Article I of the Constitution. In the cases cited by respondent to support its contention,[8] Congress ratified the executive orders involved (which may have exceeded the power delegated by Congress) not merely by failing to act when the orders were

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[7] Brief for the Respondent, pp. 31-33.

[8] *Isbrandtsen-Moller Co., Inc.* v. *U. S.*, 300 U. S. 139; *Swayne & Hoyt, Ltd.* v. *U. S.*, 300 U. S. 297.

reported to it, but by appropriation and other bills which were the product of the usual legislative process, including presentation to the President.

It is significant that Mr. Mitchell in his brief (p. 20) differs from respondent on this matter. "The conclusion that this non-action is equivalent to affirmative legislation approving the rules is inadmissible."

4. The Contempt Order and the Disposition to be Made of this Case.

In view of Mr. Mitchell's contention[9] that the contempt order should not have been issued for disobedience of the order to submit to a physical examination, petitioner wishes to explain why this question has not been raised by her.

The excerpts from the confidential proceedings of the Advisory Committee quoted in Mr. Mitchell's brief (pp. 27-36) indicate that the Advisory Committee intended that contempt orders would not be issued for failure to comply with an order for a physical examination. Petitioner was not aware of the intention of the Advisory Committee from Rule 37 of the Federal Rules of Civil Procedure, although Mr. Mitchell says that Rule 37 carries out the Committee's intention and shows clearly that the contempt order is improper.

Rule 37 (a) (2) says that for failure to submit to a physical examination "the court may make such orders in regard to the refusal as are just, and *among others* the following:" and then subdivision (iv) following lists "an order directing *the arrest* of any party or agent of a party for disobeying any of such orders, except an order to submit to a physical or mental examination." Subdivision (iv) does not speak of contempt, although elsewhere in the same rule—(b) (1)—there is a provision that certain con-

[9] Brief of William D. Mitchell, pp. 8-12.

duct may be considered a contempt of court. This seems to indicate that something other than contempt was meant in the language about arrest in subdivision (iv). Arrest might mean the bringing of a litigant into court to be examined there, a device that would be helpful when a litigant has refused to appear at a deposition hearing. Also, the language quoted above says that orders other than those listed in the rule may be made for a refusal. The language of Rule 37 thus does not seem to indicate that a contempt order is improper when a litigant refuses to submit to a physical examination, particularly in view of the clear and broad language of the statute[10] giving federal judges power to punish by contempt for disobedience of court orders.

For this reason the petitioner has never raised the question of the impropriety of the contempt order for petitioner's disobedience, and, of course, the petitioner is particularly interested in having the court determine that she need not submit to a physical examination. The other remedies for failure to submit mentioned by Mr. Mitchell (such as dismissal of the case) would be almost as effective as contempt in compelling a litigant to submit to the examination.

In any event, petitioner has no objection to either of the two courses set forth on page 25 of Mr. Mitchell's brief, if this court holds that the order to submit to the examination is valid.

Respectfully submitted,

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ROYAL W. IRWIN and
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[10] 28 U. S. C. sec. 385.

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FILE COPY

IN THE

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No. [redacted] 28

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vs.

WILSON & COMPANY, INC., *Respondent.*

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 799

HERTHA J. SIBBACH, *Petitioner,*

vs.

WILSON & COMPANY, INC., *Respondent.*

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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1. The opinion of the Circuit Court of Appeals is reported in 108 Fed. (2d) 415, and also is to be found in the Record, pp. 14-17.

2. The jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended, by the Act of February 13, 1935, 43 Stat. 936, 938. (28 U. S. C. 347a.)

3. Statement of the case and question presented:

The facts are not in dispute.

The sole question presented is as to the validity of an order entered by the United States District Court requiring the plaintiff, in this, a personal injury case, to submit

to a physical examination by a physician appointed by the court.

The order was entered in accordance with Rule 35(a) of the Federal Rules of Civil Procedure. It is attacked on the contention that that rule itself is invalid.

The cause of action sued on in this case arose in the State of Indiana where the accident occurred.

The plaintiff selected as the forum in which to try that right of action the United States District Court located in Chicago, Illinois.

The contention raised by the petitioner (Page 3, Par. 3, Page 4, Par. 4, Pages 15-17) is that the rule under which the court order was entered, abridges or modifies the substantive rights of the petitioner contrary to the Rules Enabling Act. The asserted invalidity is that, there being no *Illinois* statute authorizing the Illinois courts to require a physical examination in such a case, and the Illinois decisions being against that procedure, the plaintiff could not be compelled in the courts of Illinois to submit to such an examination; and that since the law of the State of Illinois is the law of the forum of the Federal District Court and controls that court in this matter, the rule in question could not validly authorize the entry of such an order by any Federal District Court sitting anywhere in Illinois. (Pp. 15, 16 and 17.)

4. As to the reasons advanced by the petitioner for an allowance of writ of certiorari.

The first reason advanced is that the petition presents an important question of Federal law, which has not, but should be settled by this court.

The fact is that the very questions raised in this petition were of necessity passed upon by this court at the time it approved and adopted Rule 35.

The rule in question was presented in the May 1936 preliminary draft of the rules of Civil Procedure prepared by the Advisory Committee of this court and there numbered 39, and the case chiefly here relied on by the petitioner, *Union Pacific R. R. Co.* v. *Botsford,* 141 U. S. 250, was set forth in the footnote to that rule. (See pages 69, 70.)

In the report of the Advisory Committee to this court in April, 1937, the rule in question again appeared as Rule 35, and in the footnote there was again set forth the same case, *Union Pacific R. R. Co.* v. *Botsford,* 141 U. S. 250. Following this report the Advisory Committee made its final report in November, 1937, suggesting changes in various rules, amongst others Rule 35.

In the very full notes published by the Committee thereafter in March, 1938, in addition to the *Botsford* case chiefly relied on, the Committtee cited the subsequent case of *Citizen & Suburban Railway Co.* v. *Stetson,* 177 U. S. 172.

It is also a fact that in January, 1938, the rules were submitted to Congress in accordance with the Enabling Act, and there considered. The Congressional Record in that connection shows the following:

The rules were submitted to both the Senate and the House. (75th Congress, Vol. 83, Part 1, pages 13, 38.)

A joint resolution with reference to a postponement of the consideration of the rules was referred to the Judiciary Committee. (75th Congress, Vol. 83, Part 4, page 4345.)

There was a discussion in the Senate with reference to the question whether or not the rules abridge, enlarge or modify substantive rights. (75th Congress, Vol. 83, Part 8, page 8473.)

The Senate Judiciary Committee made its report and

attached to it a memorandum dealing with substantive law and substantive rights and the question whether or not the rules listed, including Rule 35, violated substantive rights.

A further discussion was had before the Senate as to "discovery" and also Rule 35, during the course of which the *Botsford* and *Camden* cases above referred to, were discussed at length. (75th Congress, Vol. 83, Part 8, pages 8478, 8479, 8481, 8482.)

SUMMARY OF THE ARGUMENT.

The rule providing for a physical examination in a proper case is a valid exercise by this court of the power contained in the Rules Enabling Act.

The rule does not abridge or modify a substantive right.

Matters of procedure in the conduct of trials in the Federal Courts are governed by the Federal statutes. Such statutes may either make their own procedural provisions, or direct that the rules of procedure in force in the State courts be followed (as in the Conformity Act), or delegate to the Federal Courts the power to make rules of procedure (as in the present Rules Enabling Act).

Rule 35(a) deals with a matter that is the proper subject for procedural provisions. And the rule does not extend beyond that realm.

The fact that the matter involved in a rule concerns rights that are of such importance as to require a grant by the legislative body before a court can enter an order with reference to it, does not take the matter out of the realm of procedure and place it in the realm of substantive law. The Rules Enabling Act being a proper delegation of the power to make rules covers the entire field of procedure and is in itself the grant of the power to make any and all rules relating to such matters.

The position of the plaintiff that in this particular matter of procedure the Federal Court sitting in Chicago is, because of that fact, governed by the law of Illinois, is without authority to support it, is in conflict with well settled authority and is untenable.

The law of the forum of the Federal Courts sitting in Illinois is not the law of Illinois but the law of the United States.

ARGUMENT.

I.

The Rule Is Within the Power Prescribed by Congress in the Enabling Act and Does Not Abridge or Modify a Substantive Right.

Rule 35 which provides that where the physical condition of a party is in controversy the court may enter an order specifying the time, place, manner, conditions and scope of an examination to be made and the person to make it, is a valid exercise of the power delegated in the Rules Enabling Act of Congress. (Act of June 19, 1934, Chapter 651; 48 Stat. 1064, U. S. C. Title 28, Par. 723 (b) and (c).)

The rule does not infringe upon the limitation imposed in the Enabling Act, that no rule should abridge, enlarge or modify substantive rights.

The Federal Court, in determining matters of substantive law controlling rights of the parties, is governed by the statute and decisional law of the State in which the cause of action arose.

The decisional statute, so-called Paragraph 34, Federal Judiciary Act of September 24, 1789, 28 U. S. C. 725, so states, and as was said by this court in the case of *Erie Railroad* v. *Tompkins*, 304 U. S. 64, 71, that statute is declarative of the rule which would exist in the absence of the statute.

But on the other hand, the Federal Courts, in the conduct of their business, that is, in matters of procedure, are governed by the Federal constitution and statutes.

Hence, when the Act of Congress authorizing this court to make rules of procedure included the limitation that no rule should abridge or enlarge or modify substantive rights, it merely declared the situation as it would exist in the absence of such a limitation.

II.

Congress Properly Delegated to This Court the Power to Makes Rules of Procedure Governing the Federal District Courts.

The right of Congress to prescribe the rules of procedure governing the functioning of the Federal Courts is a right that Congress could properly delegate to the courts, and the limitation against abridging, enlarging or modifying substantive right merely made it clear that the delegation was of the right that Congress had to prescribe rules of procedure.

Chief Justice Marshall at an early date upheld this delegation of power to the courts (1825). *Wayman* v. *Southard,* 10 Wheaton 1.

Mr. Justice Story passed on a similar question in *Beers* v. *Haughton,* 9 Peters 329; 34 U. S. 329, and at page 359 said:

> "The constitutional validity and extent of the power thus given to the Courts of the United States, to make alterations and additions in the process, as well as in the modes of proceeding in suits, was fully considered by this Court in the cases of *Wayman* v. *Southard,* 10 Wheat. Rep. 1, and the *Bank of the United States* v. *Halstead,* 10 Wheat. Rep. 51. It was there held, that this delegation of power by Congress was perfectly constitutional; that the power to alter and add to the process and modes of proceeding in a suit embraced the whole progress of such suit, and every transaction in it from its com-

mencement to its termination, and until the judgment should be satisfied; and that it authorized the Courts to prescribe and regulate the conduct of the officer in the execution of final process, in giving effect to its judgment. And it was emphatically laid down, that 'a general superintendence over this subject seems to be properly within the judicial province, and has always been so considered'; and that 'this provision enables the Courts of the Union to make such improvements in its forms and modes of proceeding as experience may suggest; and especially to adopt such state laws on this subject, as might vary to advantage the forms and modes of proceeding, which prevailed in September, 1789."

See also *Bank of U. S.* v. *Halstead,* 10 Wheaton 22, 27.

The method in which Congress has made use of this power over the last 150 years is indicative itself of the extent of the power and the propriety of its use. We refer to the fact that from the first Congress elected to prescribe the procedure governing the conduct of equity cases by the equity rules and delegated the power to this court to formulate those rules. And the rules were upheld in the cases above cited.

But as to the conduct of the trial of law cases, Congress elected to provide a different procedure and through the Conformity Act (28 U. S. C. A., ¶ 724) to adopt not its own rules but the rules in vogue in the State where the Federal Court might be sitting. And that procedure as adopted in the Conformity Act was upheld by this court in *Beers* v. *Houghton,* 9 Pet. 355.

The Enabling Act of 1934 is but another step whereby Congress again dealt with the power to make rules governing the procedure in law cases and delegated that power to this court.

III.

The Rule Adopted Involves a Procedural Matter.

That the rule in question involves a mere matter of procedure is shown by petitioner's own admission, which is implicit in her argument.

She at no time contends that in this matter of physical examination she is governed by the law in force in the State where the cause of action arose.

It would be practically not possible for the plaintiff to take that position owing to the fact that the cause of action grew out of an accident that occurred in Indiana and is accordingly governed by the Indiana law under the case of *Erie Railroad* v. *Tompkins,* 304 U. S. 64. And in the State of Indiana the law is that the court has authority to enter an order directing a physical examination in a personal injury case.

City of South Bend v. *Turner,* 60 N. E. 271, 156 Ind. 418.

Aspy v. *Botkins,* 66 N. E. 462, 160 Ind. 170 (1903).

Kokomo M. & W. etc. Co. v. *Walsh,* 108 N. E. 19, 22 (1915), 58 Ind. App. 182.

Lake Erie & W. R. Co. v. *Griswold,* 125 N. E. 783, 784 (1920), 72 Ind. App. 265.

City of Valparaiso v. *Kinney,* 131 N. E. 237, 238 (1921), 75 Ind. App. 660.

So it was practically not possible for the plaintiff to maintain that the Indiana law applied. And she can not now maintain that the right she insists upon—the right of privacy—is a matter of *substantive law.*

On the other hand if the plaintiff were to maintain that the matter of examination was simply one of procedure,

that position would also be untenable, as procedure in the Federal Courts is governed by the rules of court made pursuant to the Acts of Congress.

Hence, the plaintiff seeks to set up and maintain a middle ground which she describes as the place where the court sits as being the place that governs this particular kind of procedure, which she seems to argue is neither a matter of substantive law nor a matter of procedure, generally speaking.

And from that position of vantage she invokes the Illinois law. In so doing, however, she in effect demonstrates that the matter is one of procedure. The very cases from Illinois cited and the very quotations made show that the orders for physical examinations are regarded as matters of practice and procedure. See *Peoria D. & E. Railroad Co.* v. *Rice*, 144 Ill. 227, 33 N. E. 951, cited on page 13 of the plaintiff's brief, particularly the quotations referring to the matters of rules of practice.

That the rule in question involves a mere matter of procedure is shown by petitioner's own admission, which is implicit in her argument.

In stating the reasons for the allowance of the writ (p. 4) the plaintiff questions the validity of the rule because of the fact that the plaintiff was a litigant "in a Federal Court sitting in Illinois". And in stating the scope of the question presented (p. 15) she again attacks the rule on the ground that it was invoked "in a Federal Court sitting in the State of Illinois where there is no State statute providing for the order and where the State courts hold the order to exceed the court's power"; and that because she has a right in the Illinois courts not to be compelled to submit to a physical examination, she is entitled to have that right enforced in a Federal Court sitting in that State. And again at page

16 where she takes the same position she states that "it may be that rule 35 does not abridge substantive rights of litigants of Federal Courts sitting in States where State statutes * * * permit order for physical examinations." And she repeats the same for States where decisions authorize such a procedure.

It is a truism that the matters coming up before a court in the trial of any lawsuit fall in one or the other of two categories—the matters relating to the substantive right of action, and the matters relating to the procedure in litigating that right of action. The petitioner, as to cases pending in a Federal Court, seeks to add a third category to which she gives no name, but which seems from her argument to depend on the mere geographical location of the Federal Court. And by this argument she seems to assert that while in determining the substantive law controlling the right of action being litigated, the Federal Court must turn to the law of the State where that right of action arose, and while in matters of procedure that Federal Court must be governed by the rules and statutes relating to the Federal Courts, in this third class, *the law of the place where the court sits applies.*

The argument seems to proceed on the theory that there should be included in that classification such items as would ordinarily fall into the category of procedure but which are related to questions of public policy in the State where the Federal Court is sitting (p. 29). In other words, the contention is that if a Federal Court is sitting in a State where the legislation or decisions of that State have declared a public policy, that declaration of public policy must of necessity control the Federal District Court in its procedural matters. No authority is cited for this proposition at all. The Illinois cases cited by counsel at most hold that there is no power in the courts to order a

physical examination short of legislative enactment. They do not declare a public policy against physical examinations in proper cases. But even if they did, there is no authority for the proposition that public policy of the State of Illinois where the Federal Court is sitting should control that Federal Court in a matter of procedure.

Moreover the proposition is repudiated by the very authority chiefly relied upon by her in the petition pending before this court, the *Botsford* case (*Union Pacific* v. *Botsford*, 141 U. S. 250) at page 256:

> "But this is not a question which is governed by the law or practice of the State in which the trial is had. It depends upon the power of the national courts under the Constitution and laws of the United States."

The plaintiff also seems to argue that because a legislative act is needed as a basis for an order directing a physical examination, therefore, the rights affected are substantive. We submit that this misconception grows out of the confusion of the rules governing substantive law and procedure on the one hand and the rule of law with reference to orders and rules of court on the other. With reference to the last category, it is, of course, a truism that the mere establishment of a court, by implication places in that court certain powers. It is also a truism that other powers that might be exercised by a court are not implied, and only obtain if they are specifically given. The power to order discovery of books and papers has frequently been held not to be an implied power and that no court can exercise such a power in the absence of a distinct authorization by the legislature to do so. The same is true with reference to the right to order a physical examination. In *Union Pacific R. R. Co.* v. *Botsford*, 141 U. S. 250, so heavily relied upon by the plaintiff, there was *no rule of court, simply an order of*

court, and this court held that the power to enter such an order could not be implied, and could only be justified by an act of the legislature. The later case of this court, *Camden & Suburban R. R. Co.* v. *Stetson,* 177 U. S. 172, holds that where a statute does give such a power to the courts, the power is valid and effective.

But the mere fact that the exercise of such a power needs an act of the legislature for its authority does not mean that the subject matter is a "substantive right."

And when Mr. Justice Gray in the *Union Pacific* v. *Botsford* case, 141 U. S. 250, said at pages 251-252, as quoted by plaintiff at page 30 in her brief, that "no right is held more sacred * * * than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law," he could mean only that the exercise of a power directing a physical examination would only be justified when that power had been established by the authority of law. He did not say, and he could not have said, that, therefore, the matter was one of substantive law as contra-distinguished to procedure. The court in that case was not concerned with whether the power was one of procedure or substantive law. It was simply concerned with whether or not the power had been expressly given, and it found that no power had been given. And the same is true in the *Camden & Suburban R. R. Co.* v. *Stetson* case, 177 U. S. 172, where the question again was whether such a power had been expressly given, and the court held it had been.

Again this court in the *Stetson* case was not concerned with drawing a distinction between substantive law and procedural law. Such a distinction was immaterial in that case. For since it involved a cause of action which arose in the same State where the trial court was sitting, and

since under the Federal statutes existing at that time the substantive right of action was governed by the law of that State as well as the procedure in the Federal Court, a distinction between the two would be of no moment. Such a distinction only becomes important where the procedural law is determined by the Federal statutes or rules and the substantive law is determined by the law of a State where the cause of action arose.

The opinion by Mr. Justice Holmes, *Stack* v. *N. Y. etc. Railroad*, 177 Mass. 155, 58 N. E. 686, quoted from so extensively by petitioner at page 33 clearly makes the same distinction.

IV.

The Plaintiff's Position Is Untenable That the Federal Court Sitting in Chicago, Illinois, Is Controlled in Its Procedural Matters by the Law of the State of Illinois.

The petitioner in seeking to avoid the dilemma as between the substantive law of Indiana and the procedural law governing the Federal Courts refers to the *law* of *the forum* where she says (p. 17): "Is it incumbent on a Federal Court sitting in Illinois to follow this Indiana Rule? Plaintiff contends that it is not, that the law of Illinois—the *law of the forum*—governs. Point IV, Pages 51-54 of this brief, contains the argument on this point." And on page 52, the plaintiff urges that "an order for a physical examination is governed *by the law of the forum.* • • • Certainly it is a matter of procedure within the rule that the law of *the forum* governs procedure." And on page 53, *"The law of the forum that the Federal Court applies is the law of the State where the court sits—in this case, Illinois."* (Italics ours.)

We submit that this position stands on an entire mis-

conception of "forum." The *lex fori*, or law of the forum, in the case of a Federal Court is the law of the United States. The United States is the forum of the Federal Court. No authority is cited for the proposition that the place where the court is sitting, that is, the State in which the Federal Court happens to sit, is the forum of that court. The Federal Courts are the creatures of the Federal Government—the constitution and Acts of Congress. The constitution and the Acts of Congress give the court its jurisdiction and the law governing it in performing its procedural functions. The State in which the court is sitting has to do with procedure only so far as the Federal statutes have clearly so provided, as was done in the Conformity Act, and as was done in one of the present Rules of Civil Procedure, the Evidence Rule No. 43.

See Bouvier's Law Dictionary—Forum.
See Bouvier's Law Dictionary—Lex Fori.

We submit that in the absence of a Federal statute so providing, there is no authority or logic to support this conception of the plaintiff that a Federal Court is bound by the law of the State where that Court geographically happens to be located.

V.

The Rule Requiring the Submission to a Physical Examination Is Not Violative of a Substantive Right.

We submit that the limitation in the Enabling Act in making use of the term substantive right uses it interchangeably with substantive law, and that it was not meant to include those numerous substantial rights which any individual may have, and which must be protected on the one hand, but on the other hand, of necessity, become affected by the course of the proceedings and practice in

the trials of a lawsuit. The most perfect example that we have of such substantive rights is found in the field of discovery. There is no right more jealously protected by the courts than that which protects its citizens against search or seizure. Yet the decisions of the courts have sustained statutes *and general rules* providing for discovery of facts that may be disclosed by books and records of parties litigant, in advance of trial.

See *Sinclair Refining Co.* v. *Jenkins Petroleum Co.*, 289 U. S. 789, and *Wilson* v. *U. S.*, 221 U. S. 361.

For a general discussion of the subject of substantive rights in connection with Rules of Civil Procedure, we refer also to American Bar Association Journal, Vol. 21, July 1935, 406, particularly the following paragraphs:

> "This was the interpretation put upon the grant of rule-making power under the English Judicature and County Courts Acts. In *Poyser* v. *Minors* (1881), 7 Q. B. Div. 329, the Court of Appeals, speaking by Lush, L. J., said:
>
> " 'Practice', in its larger sense—the sense in which it was obviously used in that (the County Courts) Act, like 'procedure' which is used in the Judicature Acts, denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines that right, and which by means of the proceeding the Court is to administer,—the machinery as distinguished from its product.'
>
> "If this interpretation of the scope of procedure is approved, the new federal rules may include the right to use, and the manner of using, every proceeding, operation, expedient or device capable of contributing to the progress of the cause, from the beginning to the end of the litigation, including mesne and final process and every type of auxiliary remedy, but they should not deal in any way with the character of the rights which are to be determined by the final judgment."

See also *Pusey & Jones Co.* v. *Henson*, 261 U. S. 491, where this court held that a statute of Delaware giving the

right to a creditor whose debt had not been paid to have a receiver appointed by the Chancery Court was not a substantive right, but a mere procedural provision, which had no effect in the Federal Courts, in view of the fact that the Federal Court procedure in equity is governed by the equity rules and not the State practice.

See also:

Washington Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co., 263 U. S. 629, 635.

Substance and Procedure, Conflict of Laws, Walter Wheeler Cook, 42 Yale Law Review 333; January 1933.

VI.

As to the Observations of the Plaintiff with Reference to the Effect of This Rule.

The plaintiff, pursuing her argument that the right of privacy is an important and substantial right, contends that Rule 35 is solely for the benefit of defendants and not plaintiffs, and, in fact, discriminates against plaintiffs (p. 43). We submit that there is not only no discrimination but that the rule is reciprocal. Of course, in view of the fact that without an act of the legislature given directly or through authorized rules of court a plaintiff in a personal injury case can hide behind an assertion of modesty and privacy and refuse to permit an examination which would prove or disprove a claimed injury, an act of the legislature or rule of court requiring such an examination is merely corrective of an equalization of the position of the parties. There is no discrimination.

In fact, such a rule works both ways. For while it is, of course, true that an examining physician appointed by the court by that very fact acquires a standing before a jury, and his testimony against the plaintiff (as counsel for

the plaintiff assume it will be), will be most telling, it is also true that his testimony would be against the defendant if the facts were as claimed by the plaintiff, and in that case the plaintiff would be at a decided advantage and the defendant at a decided disadvantage. Conceded that the ultimate objective of a trial, irrespective of the parties' attitude, is the truth, this rule aims to accomplish that purpose, whomever the truth may hurt.

Conclusion.

We submit that the decision of the Circuit Court of Appeals was correct and the Petition for Certiorari to review it should be denied.

Respectfully submitted,

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FILE COPY

IN THE

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OCTOBER TERM, A. D. 1940.

No. 28

HERTHA J. SIBBACH,

Petitioner,

vs.

WILSON & COMPANY, INC.,

Respondent.

BRIEF FOR THE RESPONDENT IN REPLY TO THE SEVERAL BRIEFS FILED BY PETITIONER.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 28

HERTHA J. SIBBACH,

Petitioner,

vs.

WILSON & COMPANY, INC.,

Respondent.

BRIEF FOR THE RESPONDENT IN REPLY TO THE SEVERAL BRIEFS FILED BY PETITIONER.

There is embodied in this one brief the respondent's reply to the petitioner's brief and reply brief in support of the petition for certiorari and the recently filed supplemental brief.

1. The opinion of the Circuit Court of Appeals is reported in 108 Fed. (2d) 415, and also is to be found in the Record, pp. 14-17.

2. The jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended, by the Act of February 13, 1935, 43 Stat. 936, 938. (28 U. S. C. 347a.)

3. Statement of the case and question presented.

The automobile accident which caused the injuries sued for in this case occurred in Indiana (R. 1), and the laws of that State determine the substantive rights involved in the plaintiff's claim for relief.

The Federal District Court sitting in Chicago, Illinois, was the forum in which the plaintiff, a non-resident of Illinois, brought this action to try out her claim (R. 1); and that court, in accordance with the Rules of Civil Procedure for the District Courts of the United States, entered the order here attacked for a physical examination of the petitioner.

Neither the form of the order itself, nor the penalty of arrest and imprisonment for contempt because of failure to obey it, has ever been questioned in this case, and no such question is raised on the record before this court.

The sole attack made by the petitioner is that the order requiring a physical examination of the petitioner is invalid because Rule 35 upon which it stands is invalid as being in conflict with the provisions of the Rules Enabling Act.

(For purposes of ready reference, the Rules Enabling Act is set forth in the appendix to this brief. There are also set forth in the same place the Rules of Decision Statute and the Conformity Act.)

SUMMARY OF THE ARGUMENT.

If the matter involved in the order for a physical examination of the petitioner is one of substantive law, then the substantive rights upon which the claim for relief is based are controlled and defined by the law of Indiana, the site of the occurrence. The law of Indiana authorizes an order requiring a physical examination.

If the matter involved in the order is one of procedural law, it is governed by the Federal law, and the Federal Rules of Civil Procedure apply.

Federal Rule of Civil Procedure No. 35 which authorized the order for a physical examination is a valid exercise by the Supreme Court of the power delegated to it by Congress in the Rules Enabling Act.

The power thus delegated is sufficiently broad to cover the entire field of practice and procedure.

The challenged rule deals with a matter of procedure, does not deal with substantive law and does not abridge or modify substantive rights established by substantive law.

The matter dealt with does not relate to the right of action involved in this procedure, but does relate to the method of determining the truth of the facts upon which the claim for relief is based.

The decisions of this court do not hold that the matter involved in the rule is one of substantive law, but on the contrary hold that it is a matter of procedural law.

The petitioner's contention that the limitation in the statute against abridging or modifying substantive rights applies to some matters of procedure which are important is not tenable.

Nor is petitioner's contention tenable that to construe the

limitation to apply to substantive rights created by substantive law would render the language surplusage. That limitation coupled with the provision against rules effecting the right of trial by jury guaranteed by the Constitution was a cautionary statement which Congress had the right to make, and particularly so in view of the fact that at that time the rule of law was still in force as announced in *Swift* v. *Tyson*, 16 Pet. 1, that matters of general law were to be determined by Federal and not by State decisions. That rule was not overruled by this court until four years after the Enabling Act was passed. (*Erie* v. *Tompkins*, 304 U. S. 64 (1938).)

The Illinois decisions holding that the Illinois courts have no power, in the absence of a statute, to order a physical examination can be of no effect whatsoever in Federal courts sitting in Illinois.

The Rules of Decision statute applies only to matters of substantive law and does not apply to matters of procedure.

It is not denied by the petitioner that Congress would have the power to enact a law providing for a physical examination. The contention of the petitioner is that the Rules Enabling Act not only does not provide for any such power but that therein Congress specifically forbade the making of rules of procedure involving important matters, such as a physical examination as specified in Rule 35; and that, therefore, in the absence of any act of Congress authorizing an order directing a physical examination, the rule is invalid.

But conceding for the purpose of the argument counsel's position that the limitation forbids abridging substantial and important rights of *procedure*, the foundation upon which the position rests fails because of the fact that all of the rules were duly reported to Congress at the beginning of a regular session and took effect at its close in accordance with the terms of the Rules Enabling Act. Thereby

the rules, including this rule 35, came to have the full force and effect of an act of Congress.

The adoption of the construction of the Enabling Act, as urged by the petitioner, would lead to such confusion in matters of practice and procedure in the Federal courts, that Congress must be presumed to have intended no such meaning.

The adoption of such construction would nullify many of the eighty-seven rules promulgated by the court in accordance with the Rules Enabling Act.

ARGUMENT.

FIRST: If the Matter Involved in the Order Attacked Be Regarded as a Matter of Substantive Law, Then the Order Is Valid, as It Is Controlled by the Law of the State Where the Cause of Action Arose—Indiana, and the Law of That State Authorizes the Courts to Make Such Orders.

That matters of substantive law are controlled by the law of the State where the cause of action arose was settled by this court in *Erie* v. *Tompkins*, 304 U. S. 67.

Under the law of Indiana where this cause of action arose, the courts have the power to enter an order directing a physical examination.

City of South Bend v. *Turner*, 60 N. E. 271, 156 Ind. 418.

Aspy v. *Botkins*, 66 N. E. 462, 160 Ind. 170 (1903).

Kokomo M. & W. etc. Co. v. *Walsh*, 108 N. E. 19, 22 (1915), 58 Ind. App. 182.

Lake Erie & W. R. Co. v. *Griswold*, 125 N. E. 783, 784 (1920), 72 Ind. App. 265.

City of Valparaiso v. *Kinney*, 131 N. E. 237, 238 (1921), 75 Ind. App. 660.

SECOND: If the Matter Involved in the Order Is One of Procedure, Then It Is Controlled by Federal Law, the Federal Rules of Civil Procedure.

Rule 35, the Rule in Question, Is Valid.

I.

Congress Has the Power and Duty to Prescribe the Procedure in the Federal Courts and That Power Can Be Validly Delegated to the Courts.

We do not understand counsel for the petitioner to question the power of Congress to prescribe rules of procedure. We do understand that they raise some question whether that power can be delegated by Congress to the courts. And in view of that question some discussion of this phase of the problem becomes necessary. Long ago this court settled the question when it held that Congress could validly delegate to the courts the power to make rules covering practice and procedure.

In the case of *Wayman* v. *Southard*, 10 Wheat. 1, the contention before the court was that a Kentucky statute in relation to exceptions should apply to procedure in the Federal courts. This court, speaking through Chief Justice Marshall, held that the Kentucky statute could have no application whatsoever for the reason that the power to control procedure of Federal courts lay in Congress and that it could delegate that power to this court, and in discussing the latter proposition, said at page 18:

> "But the objection which gentlemen make to this delegation of legislative power seems to the court to be fatal to their argument. If Congress cannot invest the courts with the power of altering the modes of proceeding of their own officers, in the service of executions issued on their own judgments, how will gentlemen defend a delegation of the same power to the state legislatures? The state assemblies do not constitute a legislative body for the union. They possess no portion of that legislative power which the constitution vests in congress, and cannot receive it by delegation. How, then, will gentlemen defend their construction of the thirty-fourth section of the judiciary act? From this section they derive the whole obligation which they ascribe to subsequent acts of the state legislatures over

the modes of proceeding in the courts of the union. This section is unquestionably prospective as well as retrospective. It regards future as well as existing laws. If, then, it embraces the rules of practice, the modes of proceeding in suits; if it adopts future state laws to regulate the conduct of the officer in the performance of his official duties, it delegates to the state legislatures the power which the constitution has conferred on Congress, and which, gentlemen say, is incapable of delegation."

Mr. Justice Story passed on a similar question in *Beers* v. *Haughton*, 9 Peters 328, 34 U. S. 329, and said at page 359:

"State laws cannot control the exercise of the powers of the national government, or in any manner limit or affect the operation of the process or proceedings in the National Courts. The whole efficacy of such laws in the Courts of the United States depends upon the enactments of Congress. So far as they are adopted by Congress they are obligatory. Beyond this, they have no controlling influence. Congress may adopt such state laws directly by a substantive enactment, or they may confide the authority to adopt them to the courts of the United States."

* * * * * * *

"The constitutional validity and extent of the power thus given to the Courts of the United States, to make alterations and additions in the process, as well as in the modes of proceeding in suits, was fully considered by this Court in the cases of *Wayman* v. *Southard*, 10 Wheat. Rep. 1, and the *Bank of the United States* v. *Halstead*, 10 Wheat. Rep. 51. It was there held, that this delegation of power by Congress was perfectly constitutional; that the power to alter and add to the process and modes of proceeding in a suit embraced the whole progress of such suit, and every transaction in it from its commencement to its termination, and until the judgment should be satisfied; and that it authorized the Courts to prescribe and regulate the conduct of the officer in the execution of final process, in giving effect to its judgment. And it was emphatically laid down, that 'a general superintendence over this subject seems to be properly within the judicial province, and has always been so considered'; and that 'this

provision enables the Courts of the Union to make such improvements in its forms and modes of proceeding as experience may suggest; and especially to adopt such state laws on this subject, as might vary to advantage the forms and modes of proceeding, which prevailed in September, 1789."

See also *Bank of U. S.* v. *Halstead*, 10 Wheaton 22, 27.

II.

The Language of the Enabling Act With Reference to the Subjects to Be Covered by the Rules Broadly Authorizes Rules Covering the Entire Field of Practice and Procedure.

The enabling paragraph of the act gives the Supreme Court the power to prescribe by general rules the "forms of process, writs, pleadings and motions and the practice and procedure" in civil actions at law. The courts from the very beginning of the national government have given the broadest possible meaning to these terms.

The cases above quoted demonstrate the accuracy of that proposition. In the Wayman case (*Wayman* v. *Southard*, 10 Wheat. 1) the court said with reference to the term "forms and modes of proceeding" (p. 7):

> "It has not, we believe, been doubted, that this sentence was intended to regulate the whole course of proceeding, 'in causes of equity, and of admiralty and maritime jurisdiction.'"

In the case of *Kring* v. *Missouri*, 107 U. S. 221 (1882), the question before the court was whether a certain statute of the State of Missouri violated the constitutional provisions against *ex post facto* laws.

If the statute involved a mere matter of procedure, there was no constitutional violation. This court, in discussing that question, says at page 231:

> "The word 'procedure', as a law term, is not well

understood, and is not found at all in Bouvier's Law Dictionary, the best work of the kind in this country. Fortunately a distinguished writer on Criminal Law in America has adopted it as the title to a work of two volumes. Bishop on Criminal Procedure. In his first chapter he undertakes to define what is meant by procedure. He says: 'S.2. The term 'procedure' is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, Pleading, Evidence and Practice.' And in defining Practice, in this sense, he says: 'The word means those legal rules which direct the course of proceeding to bring parties into the court and the course of the court after they are brought in;' and Evidence, he says, as part of procedure, 'signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted.' "

The English Courts have had to consider most meticulously the difference between substantive law and procedure owing to the fact that cases involving questions of procedure may be considered only by certain courts on appeal. See *Lever Bros. Ltd.* v. *Kneale & Bagnell*, 157 L. T. R. 30, 2 K. B. 87, 92 (1937). The case of *Poyser* v. *Minors*, 56 L. T. R. 33, 7 Q. B. D. 329 (1881) is typical. There a rule of court as to the effect of a non-suit was challenged on the ground that it attempted to declare substantive law, *i. e.*, the legal effect of the judgment of the court. The court, in ruling against this contention, said (333):

> "Practice in the larger sense • • • like procedure • • • denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right and which, by means of the proceeding, the court is to administer, the machinery, as distinguished from its product."

Of course in the construction of any statute the condition which the statute sought to remedy, the general purpose and objective of the statute must be considered. The

Rules Enabling Act was enacted after a long debate conducted by the bench and bar and by Congress with reference to the procedural difficulties that had developed in the Federal courts. We can find no better expression of the existing situation and its importance in the matter we are here discussing than in the language of one of the members of the Advisory Committee, Mr. Edson R. Sunderland in his article in the American Bar Association Journal entitled "Character and Extent of the Rule Making Power Granted United States Supreme Court and Methods of Effective Exercise," Volume XXI, page 404. He says in part as follows:

> "The purpose of the present grant of rule-making power should therefore constitute an important guide for determining what should be deemed procedure and what should be considered matter of substantive right.
>
> It would seem reasonable to assume that the general purpose of the present Act was to confer upon the Supreme Court of the United States broad regulatory powers over federal machinery for the administration of justice, in order to increase its general effectiveness. No special purpose is apparent which would be served by restricting its scope. The right given to the Court to override existing statutes indicates a purpose to confer broad rather than narrow powers. Under this view, all those rights and duties which control the relations of individuals with each other and with the body politic, would remain under legislative control; but the means and the methods by which those rights and duties are to be protected and enforced through the courts, would be under the direction of the Supreme Court. In other words the rights which may normally be enjoyed under the legal system without recourse to a court, or the final equivalents therefor offered by the law in case they are denied, are substantive, but when the parties have been drawn into litigation, every means and facility which the court offers, whether through its ordinary mechanism or through special proceedings or auxiliary remedies, to aid or protect those rights or to provide those equivalents, is procedural."

And:

"If this interpretation of the scope of procedure is approved, the new federal rules may include the right to use, and the manner of using, every proceeding, operation, expedient or device capable of contributing to the progress of the cause, from the beginning to the end of the litigation, including *mesne* and final process and every type of auxiliary remedy, but they should not deal in any way with the character of the rights which are to be determined by the final judgment."

III.

The Challenged Rule Deals With a Matter of Procedure, Does Not Deal With Substantive Rights.

Rule 35 of the Federal Rules of Civil Procedure involves a matter of procedure. It does not involve substantive law, nor abridge nor modify a substantive right established by substantive law. The substantive rights in this case are those rights out of which the right of action arose. This rule does not affect any of the rights that go to make up that right of action, but merely affects the procedure whereby that right of action is sought to be determined; it is a part of the means whereby the court determines the truth of the facts upon which the right of action is based.

In the language of the cases above referred to, the rule provides but a step to be taken in the cause. It is a part of the course of the proceeding. It is the method of proceeding whereby the right of action is enforced as distinguished from the law giving or defining that right. It is part of the court machinery as distinguished from the ultimate result.

It appears necessary to discuss this question as we are not quite clear whether counsel for petitioner do or do not maintain that Rule 35 involves a matter of substantive law as contradistinguished to procedural law. They do

seem to admit that the matter is one of procedure, and yet they discuss at length the Rules of Decision statute and the case of *Erie R. R.* v. *Tompkins,* 304 U. S. 64, and seem at least in part to base their argument on a substantive law consideration, as defined in the decision of this court in that case.

In the *Erie Railroad* case this court settled the rule that matters of substantive law are governed by the law of the State where the court of action arose and that the source of substantive law is not merely, as was held in *Swift* v. *Tyson,* 16 Pet. 1, the statutes of a State, but also the decisions of the State in question; and that any other decision and any other construction of the Rules of Decision Act would be in violation of the Constitution. These matters we mention as a preliminary consideration to a discussion of the case of *Union Pacific* v. *Botsford,* 141 U. S. 250, which is cited in support of the contention that the rule we are considering abridges a substantive right.

We respectfully submit that a brief review of the facts and opinion in the Botsford case will demonstrate that it does not support the contention, and on the contrary clearly shows that the matter involved is one of procedural law and not substantive law.

In that case there was involved no Federal statute authorizing an order for a physical examination; there was no general rule of court to that effect, but simply an order of court without a statute or general rule back of it. The accident out of which the cause of action arose occurred in the then territory of Utah (a fact not stated in the opinion but to be found on page 1 of the printed record). The case was tried in the Federal Court sitting in Indiana. The holding of this court was that the trial court "has no power to subject a party to such an examination as this." (p. 257.) In other words, the sum and substance of the decision is that in the absence of a statute authorizing it,

the order was invalid. That is doubly clear when we come to consider the subsequent case of *Camden & Suburban R. R. Co. v. Stetson*, 177 U. S. 172, where this court held that in view of a statute authorizing an examination, the order was valid.

The holding that the court did not have the "power" to enter such an order does not indicate that the matter involved substantive law or substantive rights. The "power" of the court could, of course, refer to either matters of substantive law or procedural law.

In no part of the decision in the Botsford case did this court hold that the matter involved in an order for a physical examination is one of substantive law or involves a substantive right established by substantive law.

On the contrary the matter is treated throughout the opinion as a matter of procedure. That is demonstrated beyond dispute by the fact that in treating a contention made by the defendant that a certain statute of Indiana permitting the court to order a view of such real or personal property, as was the subject of the litigation, or of the place where any material fact occurred, this court held that the statute could not apply for the reason as follows (p. 256):

> "But this is not a question which is governed by the law or practice of the State in which the trial is had. *It depends upon the power of the national courts under the Constitution and laws of the United States.*" (Italics ours.)

That statement would not have been possible had the court been considering the matter as one of substantive law, as matters of substantive law would be controlled by the law of the State where the cause of action arose and not by the Constitution or laws of the United States. The Rules of Decision Act then in force 100 years so provided and the decisions of this court, particularly the case of *Wayman* v. *Southard*, 10 Wheat 1, 26, settled the proposi-

tion, as said by Chief Justice Marshall that the Rules of Decision statute "had no application to the practice of the court."

And even though at that time under the rule of *Swift* v. *Tyson*, 16 Pet. 1, the substantive law could be determined solely from the statutes of the State and not from its decisions, nevertheless as we have seen above, the court in the *Botsford* case was considering whether or not an Indiana statute was applicable—the one permitting an order for a view of the property or place involved in the litigation. So, therefore, when this court in the *Botsford* case said that the matter was not one to be governed by the statute of Indiana, *in view of the conflicting Federal statute*, but did depend "upon the power of the national courts under the Constitution and laws of the United States", it demonstrated that it was treating the matter as one of practice and procedure and not one of substantive law. This is still further borne out in the opinion by the next succeeding paragraph where the court discusses the Indiana statute and points out that Congress had covered the subject in its statute with reference to proof and that, therefore, the Federal statute controlled. The language of the court in that regard is as follows (page 256):

> "Congress has enacted that 'the mode of proof in the trial of actions at common law shall be by oral testimony and examinations of witnesses in open court, except as hereinafter provided, and has then made special provisions for taking depositions. Rev. Stat. §§ 861, 863 *et seq.* The only power of discovery or inspection conferred by Congress, is to 'require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery,' and to nonsuit or default a party failing to comply with such an order. Rev. Stat. § 724. And the provision of § 914, by which the practice, pleadings and forms and modes of proceeding in the courts of each State are to be

followed in actions at law in the courts of the United States held within the same State, neither restricts nor enlarges the power of these courts to order the examination of parties out of court."

But this could not have been said if the matter involved was one of substantive law.

That this analysis is valid is still further apparent from the fact that the court relies upon the case of *Ex Parte Fisk*, 113 U. S. 713, wherein the question was whether a New York statute requiring an examination by deposition in advance of trial could have effect in the federal courts. This Court held it could not in the face of the Federal statutes controlling the same subject matter. The New York statute was obviously one of procedure and, of course, the decision could have had no part in the opinion of the *Botsford* case unless this Court were regarding the matter involved in the *Botsford* case as one of procedure.

Nor does the succeeding case in this court, *Camden & Suburban R. R. Co.* v. *Stetson*, 177 U. S. 172, hold that the matter involved is one of substantive law. It is true the opinion of the court refers to and is based upon the Rules of Decision Act and that the Rules of Decision Act does, of course, only apply to substantive law. *But in that case the same State, New Jersey, was the scene of the accident, the place where the right of action arose, and the place where the Federal Court sat to try out that right of action. Therefore, there was no question before the court requiring any distinction between substantive law and procedural law.*

The sole question presented was the effect of a statute of New Jersey. That statute did not merely cover the general matter of discovery in conflict with the Federal statutes, as in the Botsford case, but did specifically authorize the courts of New Jersey to enter an order for a physical examination. The statute was in conflict with no Federal statute. The Rules of Decision statute required

in the field covered by it, that the New Jersey statutes be given full force and effect. The Conformity statute also required in the field covered by it, that the New Jersey statute control. So that it was immaterial which Federal statute was applied. The same result would be reached under either.

And even though this court did apply the Rules of Decision statute in the Stetson case, we submit that the decision itself clearly demonstrates that the court did in fact treat and regard the matter as one of procedure, as particularly the following excerpts from the opinion indicate (p. 175):

> "We do not dispute *that if there were no law of the United States which, in connection with the state law, could be referred* to as in effect providing for the exercise of the power, the court could not grant the order under the decision in the case of Botsford. But we say *there is a law of the United States* which does apply the laws of the State where the United States *court sits,* and where the State has a law which provides for the making of an order for the examination of the person of a plaintiff in a case like this, the law of the United States applies that law to cases of such a nature on trial in *Federal courts sitting in that State.* In the *Botsford* case there was no state law, and consequently no foundation for the application of the law of the United States." (Italics ours.)

Obviously if the question involved were one of substantive law, it would have made no difference one way or another whether or not there was a Federal statute, the State law would have been controlling and this utterance would have been entirely foreign to the subject.

It is also to be noted from the above excerpts from the opinion in the Camden case that the court in applying the Federal statute speaks of the State where *"the court sits"* and the application of the law to cases on trial "in Federal Courts *sitting in that State.*" The Rules of Decision statute governing *substantive law* does not mention

the State where the court is sitting. The place where the court is sitting has no bearing upon the question of the law applicable under the Rules of Decision statute. It is the State where the cause of action arose that determines that question. But the Conformity Act (see appendix to this brief) does specify that the *procedural* law to be applied is the law of the State where the court sits, the language being "within which such district courts are held". Hence, it seems true that while the Rules of Decision Act was the one spoken of, the basic legal principle involved and applied was that expressed in the Conformity statute, and that the apparent confusion grew out of the very fact that under the particular facts of that case, either statute might be regarded as applicable and would produce the same result.

In *Chicago & North Western Ry. Co. v. Kendall*, 167 Fed. 62 (1909), there was attacked in a Federal Court sitting in Iowa an order for a physical examination of the plaintiff in a suit on account of an accident and personal injury occurring in Iowa. There were Iowa decisions upholding the power of the Iowa courts to enter such an order, and the question was whether those decisions were binding on the Federal Court under the Rules of Decision Act or under the Conformity statute. The court holding after a very full discussion that the Conformity Act applied says, at page 65:

> "The question is not whether such testimony would be admissible in evidence, but whether the court has, at common law, the power to compel the plaintiff to submit to a surgical examination. *We are therefore presented with a matter of practice rather than a rule of evidence.*"

And again:

> "*Being a matter of practice relating to the power of courts, neither state statutes nor the decisions of state courts on the subject* are binding on federal courts under section 721 of the Revised Statutes.

This was early decided by the Supreme Court in *Wayman* v. *Southard,* 10 Wheat. 1, 6 L. Ed. 253. It was there held that section 34 of the judiciary act, being the same as section 721 of the Revised Statutes—

> 'does not apply to the process and practice of the federal courts; it is a mere legislative recognition of the principles of universal jurisprudence as to the operation of the *lex loci.*'

In a great variety of cases coming before this court over the years, the question was presented whether certain State statutes should be given effect in the Federal courts. And in those cases, this court consistently held that the statutes involved were not applicable and had no effect whatever in the Federal Court, either for the reason that there was no Federal statute making them applicable or for the reason that the Conformity statute could not make them applicable in the face of a Federal statute specifically covering the matters. The significance of the decisions is that if the matters covered by the state statutes were in the class of substantive law, the statutes would have been applicable and controlling under the Constitution and Rules of Decision Act irrespective of the Conformity Act or any other Federal statute.

A running review of these cases shows the very broad field covered by procedure and demonstrates that the matter of physical examination is within that field.

In each of these cases it was held that the statute mentioned was of no effect in the Federal court.

McCracken v. *Hayward,* 2 Howard 608. A statute of Illinois providing that a sale under levy should not be confirmed unless the price be two-thirds of the appraised value of the property.

Bank of the United States v. *Halstead,* 10 Wheat. 51. A Kentucky statute prohibiting the sale of property taken under execution for less than three-fourths of its appraised value.

Wayman v. *Southard*, 10 Wheat. 1. A Kentucky statute requiring the endorsement on an execution that bank notes of the Bank of Kentucky be received in payment.

Shepard v. *Adams*, 168 U. S. 618. A Colorado statute with reference to the issuance of summons.

Southern Pacific Co. v. *Denton*, 146 U. S. 202. A Texas statute concerning service of process and providing for a waiver by the defendant of any defect as a result of pleading over after the lower court had ruled againsnt the defendant.

Mexican Central Railway v. *Pinkney*, 149 U. S. 194. To the same effect.

Potter v. *National Bank*, 102 U. S. 163. A statute of Illinois involving the competency of witnesses and the Federal statute covering the same subject.

King v. *Worthington*, 104 U. S. 44. To the same effect.

Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491. A Delaware statute providing for the appointment of a receiver of an insolvent debtor for the benefit of any creditor.

Hanks Dental Association v. *Tooth Crown Co.*, 194 U. S. 303. A New York statute providing for the taking of depositions of an opposite party.

Ex Parte Fisk, 113 U. S. 713. To the same effect.

David Upton's Sons v. *Auto Club of America*, 225 U. S. 489. A New York Statute forbidding a foreign corporation doing business in that State without a license from maintaining any action in that State.

Nudd, et al. v. *Burrows*, 91 U. S. 426. An Illinois statute requiring the court to instruct only in writing held not to apply and limit the Federal Court sitting in Illinois from instructing orally.

Vicksburg and Meridian Railroad Co. v. *Putnam*, 118 U. S. 545. To the same effect.

St. Louis, Iron Mountain & Southern Ry. v. *Vickers*, 122

U. S. 360. To the same effect even where the State Constitution provides that juries must be instructed in writing and not orally.

Lincoln v. *Power,* 151 U. S. 436. To the same effect.

Payne v. *Hook,* 74 U. S. 425. A Missouri statute limiting rights of action against executors to the Probate Court.

In the case of *Camden & Suburban R. R. Co.* v. *Stetson,* 177 U. S. 172, this court reviewed extensively the case of *McGovern* v. *Hope,* 63 N. J. Law, 45 Atlantic Reporter, and also reviewed the case of *Lyon* v. *Railway Co.,* 142 N. Y. 298, 37 N. E. 113. In the last mentioned case which involved a statute of New York authorizing an order requiring a physical examination, the Court of Appeals of New York said (p. 113); (Italics ours)

> "*The statute enacts a rule of procedure, the purpose of which is the discovery of the truth* in respect of certain allegations which the plaintiff has presented for judicial investigation in the courts of justice. It prescribes a method of aiding the court and jury in the correct determination of an issue of fact raised by the pleadings, and, as it seems to me, does not violate any of the express or implied restraints upon legislative power to be found in the fundamental law."

This language was quoted with approval and followed in the New Jersey case above referred to.

In the Illinois cases relied upon by counsel for petitioner, the Supreme Court while denying the right of the lower courts to make orders for examination in the absence of a general rule or statute, treats the matter as one of practice.

See *Peoria, D. & E. Ry. Co.* v. *Rice,* 144 Ill. 227, 33 N. E. 951 (1893). Petitioner quotes from page 232 of the Illinois report, Petitioner's Brief, p. 13, as follows:

> "*Rules of practice must be laid down,* not with reference to a single case, but to be applied generally, and we entertain no doubt that our conclusion heretofore announced on this subject is the better and *safer practice.*" (Page 13, Petitioner's Brief.)

The case of *Stack* v. *New York, N. H. & H. Ry. Co.*, 58 N. E. 686 (Mass. 1900) relied on by the plaintiff contains an opinion by Chief Justice Holmes of the Massachusetts Supreme Court. Reference to that opinion shows that he treated the matter as being without doubt a matter of procedure. After speaking of the holding of this court in the case of *Union Pacific* v. *Botsford*, 141 U. S. 250, that the court in and of itself had no power to enter the order, Mr. Justice Holmes said, at page 686:

> "But, if the power should be deemed needful to a more perfect *administration of justice*, the *remedy* should be furnished by the legislature, which as yet has not gone so far." (Italics ours.)

The matter here involved is really a part of the general subject of discovery and the courts from the very first have sustained discovery statutes as a matter of procedure.

Discovery statutes were attacked on the ground that they constituted invasion of the substantive rights of the parties litigant and yet such statutes have been uniformly upheld as not invading the substantive rights of the parties. For example, see Federal Discovery in Operation, by James A. Pike and John W. Willis, University of Chicago Law Review, February 19, 1940, Vol. 7, p. 297, where there is a full discussion on this subject.

In *Sinclair Refining Co.* v. *Jenkins*, 289 U. S. 689, there was a bill for discovery on the equity side of the court for aid in the trial of a law suit pending. It was held to be a valid procedure, the court saying, at page 693:

> "1. The remedy of discovery is as appropriate for proof of a plaintiff's damages as it is for proof of other facts essential to his case.
>
> Help for the solution of problems of this order is not to be looked for in restrictive formulas. Procedure must have the capacity of flexible adjustment to changing groups of facts. The law of discovery has been invested at times with unnecessary mystery. There are few fields where considerations of practical

convenience should play a larger role. The rationale of the remedy, when used as an auxiliary process in aid of trials at law, is simplicity itself. At times, cases will not be proved, or will be proved clumsily or wastefully, if the litigant is not permitted to gather his evidence in advance."

See also for a full discussion of this problem the following:

The Origin of the Conformity Idea, Its Development, the Failure of the Experiment, the Evils Which Resulted Therefrom, and the Cure for Those Evils, by Edgar B. Tolman, American Bar Association Journal, December 1937, Page 971.

To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence? By T. F. Green, American Bar Association Journal, June 1940, Page 482.

On this question whether the matter of a physical examination of a party litigant in a proper case is a matter of substantive law or infringes a substantive right, we submit the following quotation from the dissenting opinion in the case of *Union Pacific* v. *Botsford*, 141 U. S. 250, as an apt expression of the general problem involved where legislation has covered the subject, even though in the *Botsford* case the language was in conflict with the majority opinion in the absence of such legislation (page 258):

"The end of litigation is justice. Knowledge of the truth is essential thereto. It is conceded, and it is a matter of frequent occurrence, that in the trial of suits of this nature the plaintiff may make in the court-room, in the presence of the jury, any not indecent exposure of his person to show the extent of his injuries; and it is conceded, and also a matter of frequent occurrence, that in private he may call his personal friends and his own physicians into a room, and there permit them a full examination of his person, in order that they may testify as to what they see and find. In other words, he may thus disclose the actual facts to the jury if his interest require;

but by this decision, if his interests are against such a disclosure, it cannot be compelled. It seems strange that a plaintiff may, in the presence of a jury, be permitted to roll up his sleeve and disclose on his arm a wound of which he testifies; but when he testifies as to the existence of such a wound, the court, though persuaded that he is perjuring himself, cannot require him to roll up his sleeve, and thus make manifest the truth, nor require him in the like interest of truth, to step into an adjoining room, and lay bare his arm to the inspection of surgeons. It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration; and if in other cases in the interests of justice, or from consideration of mercy, the courts may, as they often do, require such personal examination, why should they not exercise the same power in cases like this, to prevent wrong and injustice?"

IV.

The Petitioner's Contention Is Not Tenable That the Term "Substantive Rights" Means Rights That Are Important or of Substance and Which Are in Fact Affected by Rules that Are Purely Procedural.

We wish now to turn to that contention of counsel for the petitioner that even conceding that Congress had the right to delegate the power to make such a rule as here involved, it did not do so, but on the contrary by directing the court not to make rules modifying substantive rights, it distinctly limited the delegation of power so as to forbid any rule abridging or modifying any right which is substantive in the sense of being substantial or important. The right asserted is, as expressed by the petitioner, "a right in the Illinois courts not to be compelled to submit to a physical examination" to determine the injuries she claimed were caused by the defendant. (Plaintiff's brief, p. 16.)

But the term "substantive rights" has no such limited meaning. That term has come to have a definite meaning. It is used interchangeably with "substantive law", depending upon the form of the expression; that is to say, whether one is speaking of the rights themselves or the source of those rights. If one is speaking of the source of such rights, the term used is substantive law. If one is speaking of the rights created by that source, the term used is substantive rights. And either term, substantive rights or substantive law, is directly in apposition to that other branch of the law covered by the term "procedural" or "adjective" law.

Moreover it is clear beyond dispute that no party litigant has a substantive right in any kind of procedure. That is too well settled by this court to require any discussion.

Luria v. *United States*, 231 U. S. 9.
Ochoa v. *Hernandez*, 230 U. S. 139.
Bronson v. *Kinzie*, 42 U. S. 311.
McCracken v. *Hayward*, 43 U. S. 608.
Home Bldg. & Loan Assn. v. *Blaisdell*, 290 U. S. 398.

Hence, the first answer to the contention of counsel for the petitioner is that Congress in making use of the term must be held to have used it in its ordinary accepted sense as covering substantive law as contradistinguished to procedure.

Counsel for the petitioner, in support of their petition, argue:

First, (a) that to give the language any other meaning, particularly the meaning that the limitation is directed against the abridging of substantive rights created by substantive law, would be to make the language purely surplusage, as Congress had no authority to change substantive laws.

Second, (b) that the plaintiff has a substantive right

under the law of Illinois not to be compelled to submit to a physical examination and that the Federal Court sitting in Illinois should apply Illinois law.

Third, (c) that the right is declared by this court in the case of *Union Pacific* v. *Botsford*, 141 U. S. 250, to be a substantive right, as that term is above defined by counsel.

We will discuss these propositions in the order named.

(a) *As to the contention that to give any other meaning to the limitation in the Rules Enabling Act than that contended for by the petitioner is to render the limitation surplusage and meaningless.*

This contention overlooks the fact that in the same paragraph there is included a limitation that in promulgating a union of equity and law rules "the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate."

Certainly no one would contend that a rule modifying the right of trial by jury would be any the more effective in the absence of the injunction by Congress in the Enabling Act that this court make no rule violating the constitutional provisions as to jury trials. Congress neither had the power to abridge that right of trial by jury by any legislation nor could it delegate any such power to the court. And yet there is no other meaning to the language than that it is a specific injunction against a rule violating constitutional rights.

This same consideration applies to the language with reference to substantive rights. Moreover, that language did have a particular meaning in view of the fact that the rule of *Swift* v. *Tyson*, 16 Pet. 1, was the law at the time the Enabling Act was passed in 1934, and it might well have been contended under the rule of that case that Congress had the power to enact statutes affecting substantive

law, as declared by State decisions as contradistinguished to State statutes. It was not until 1938 that this court in *Erie* v. *Tompkins*, 304 U. S. 64, overruled the rule announced in *Swift* v. *Tyson*, 16 Pet. 1.

Therefore, Congress would be well justified in specifically providing that the rules authorized by the Enabling Act should be outside of the field of substantive law and be confined to the field of procedural law.

Certainly a forced and distorted construction of the Rules Enabling Act should not be permitted simply because of an expression by Congress of a natural human tendency, almost impossible to resist, to add words of caution when using words of permission or words delegating authority.

(b) *As to the contention that the plaintiff has a substantive right under the law of Illinois not to be compelled to submit to a physical examination and that the Federal Court sitting in Illinois should apply the Illinois law.*

In view of the fact that counsel for the petitioner in the reply brief filed when the petition for writ of certiorari was being considered took issue with us as to our statement of their position with reference to the Illinois law, we feel it necessary to set forth fully their own statement of that position:

They say:

> "* * * an order for a physical examination may not be granted under Rule 35 in a federal court sitting in a state, as Illinois, where there is no state statute providing for the order and where the state courts hold the order to exceed a court's power. * * * Plaintiff contends that Rule 35 abridges her substantive rights because she has a right in the Illinois courts not to be compelled to submit to a physical examination; and that Rule 35 is thus invalid as to her." (Petitioner's Brief, p. 15.)

And after referring to the law of Indiana which requires

the plaintiff in a personal injury suit to submit to a physical examination, petitioner says, at page 17 of the brief:

> "Is it incumbent on a federal court sitting in Illinois to follow this Indiana rule? Plaintiff contends that it is not, that the law of Illinois—the law of the forum—governs."

They argue that it is inconceivable that an Illinois state court would order a physical examination in a case where the tort occurred in another state, and conclude:

> "The law of the forum that a federal court applies is the law of the state where the court sits—in this case, Illinois. There is thus no basis for applying the Indiana law." (Petitioner's Brief, p. 63.)
>
> * * * * *
>
> "Thus, no matter how an order for a compulsory physical examination may be classified in determining whether or not it modifies the substantive rights of a litigant, it is clear that it is classified as a rule of procedure within the rule that the law of the forum governs procedure." (Petitioner's Brief, p. 54.)

When in reply it was pointed out by the respondent that the forum of the Federal District Court is the United States and not Illinois and that Illinois law has no part at all in the solution of the problem, counsel for petitioner said in his reply brief, at page 2:

> "This contention of the petitioner does not in itself involve the law of Illinois. But certain excluding distinctions made in petitioner's brief required a description of the Illinois law. These distinctions were made to define the scope of the question presented and to show that the petitioner was in a position to make the contention outlined above."

Whatever may be the limitation that counsel meant by the quoted language to be put upon the position taken in their original argument, as above set forth, the fact remains they contend that the law of Illinois has *some effect somehow* in this matter. But it is settled beyond dispute that no State law, either decisional or statutory, has any effect whatsoever to govern Federal courts in matters of

procedure; unless, of course, a specific act of Congress adopts State law of procedure. And now that the Conformity Act which accomplished that purpose has become "of no further force or effect" and has been superseded by the Federal Rules of Civil Procedure, there is no Federal statute which makes State laws applicable to procedure in the Federal District Courts (except, of course, a limited number of the rules themselves not now in question in this case, *e. g.*, Evidence Rule 43, Rules 62, 64 and 69).

The cases cited above under Point III conclusively establish that proposition as follows:

McCracken v. *Hayward*, 2 Howard 608.
Bank of the United States v. *Halstead*, 10 Wheat 51.
Wayman v. *Southard*, 10 Wheat 1.
Beers v. *Haughton*, 34 U. S. 329, 359.
Shepard v. *Adams*, 168 U. S. 618.
Southern Pacific Co. v. *Denton*, 146 U. S. 202.
Mexican Central Railway v. *Pinkney*, 149 U. S. 194.
Potter v. *National Bank*, 102 U. S. 163.
King v. *Worthington*, 104 U. S. 44.
Pusey & Jones Co. v. *Hanssen*, 261 U. S. 491.
Hanks Dental Assn. v. *Tooth Crown Co.*, 194 U. S. 303.
Ex Parte Fisk, 113 U. S. 713.
David Upton's Sons v. *Auto Club of America*. 225 U. S. 489.
Nudd et al. v. *Burrows*, 91 U. S. 426.
Vicksburg and Meridian Railroad Co. v. *Putnam*. 118 U. S. 545.
St. Louis, Iron Mountain & Southern Ry. v. *Vickers*, 122 U. S. 360.
Lincoln v. *Power*, 151 U. S. 436.
Payne v. *Hook*, 74 U. S. 425.

The argument of the petitioner seems to be based on the proposition that the Rules of Decision statute is what controls and that where there is in the State where the Federal Court is sitting no statute providing for a physical examination, there can be no Federal rule of court permitting it.

But the Rules of Decision statute can not help the petitioner in any way, as that statute does not apply to matters of procedure, and does apply only to matters of substantive law. That proposition counsel for the petitioner themselves recognize and in fact assert with supporting authorities in another section in their brief. Counsel say, at page 38:

> "Chief Justice Marshall said that it (The Rules of Decision Statute), 'has no application to the practice of the court. * * *' (*Wayman* v. *Southard*, 10 Wheat, 1, 26 (1825.) * * * 'This statute refers only to substantive law and has no application to procedure in federal courts.' (3 Foster, Federal Practice, 6th ed., 1921, p. 2448.) * * * 'Again, the statute refers to state statutes governing substantive rights; it does not apply to state statutes of procedure' (Dobie, Federal Procedure, 1928, p. 560)."

(c) *As to the contention that this court has held that the matter involves a substantive right as counsel define that term.*

The two cases relied upon by counsel for the petitioner in support of this contention are *Union Pacific Railway Co.* v. *Botsford*, 141 U. S. 250, and *Camden and Suburban Railway Company* v. *Stetson*, 177 U. S. 172.

All that the *Botsford* and *Camden* cases hold is that an order of court for an examination to be valid must have behind it an act of the legislature. As said in the *Camden* case, at page 174:

> "It is settled in this court that no power to make such an order *exists at common law;* in other words, the *court* has *no inherent power* to make it." (Italics ours.)

But where there is an act of the legislature behind the order, then the order is valid and that is settled by those very cases. But what legislature?

Obviously the legislation must be by Congress, since it is clear that the matter involved is in fact procedure and, moreover, the basic assumption in counsel's argument is that it is procedure. That argument proceeds on the theory that the dividing line between permissible and prohibited rules does not lie between substantive law and procedural law, but between two classifications of procedural law, one of which, according to counsel's conception, includes ordinary matters that are within the court's rule making power and the other of which includes important matters of substance which are not within that power *in the absence of enabling legislation.*

But assuming for the sake of argument only that counsel's position is correct with reference to this classification, the question is at once reduced to the inquiry whether there is an Act of Congress authorizing an order for a physical examination. Clearly we have such a legislative act in this case.

Congress in the Rules Enabling Act made a broad delegation of power to this court:

(1) To promulgate law rules and by their very promulgation render all acts of Congress in conflict therewith of no further force or effect; and

(2) To unite the equity and law rules, such rules to take effect upon the close of the Congressional session at which they were duly reported.

And in accordance with those very terms of the Rules Enabling Act, the Rules of Civil Procedure for the District Courts of the United States were ordered by this court to be transmitted to the Attorney General on December 20, 1937, so that he might report them to Congress (302 U. S. 783), and they were by him reported to Con-

gress at the beginning of a session on January 3, 1938. Then followed extensive hearings before the Senate and House Committees having the matter in charge and extensive discussions were had in both houses of Congress concerning all the rules, the limiting provision in the Enabling Act, and this particular Rule No. 35. There was also presented a resolution to postpone the approval of the rules. But this resolution was unfavorably acted upon and the session came to a close without Congress making any change in the rules whatever. (See hearings before the House Committee, pages 47, 67, 105, 117, 131, 141 before the Senate Committee, pages 1, 9, 10, 18, 20, 21, 28, 29, 36-44, and also Congressional Record, Volume 83, Part H, pages 8473 to 8474.)

Thereby the rules became effective. And whatever question previously might have been raised as to the validity of some of them on the theory that a legislative act was wanting, that question disappeared by virtue of the action of Congress in accepting the rules without change. Such was the effect, whether the action of Congress (1) be regarded merely as indicating that there was no curtailing by Congress of the broad powers previously delegated; or (2) be regarded as a reaffirmance of that delegation of power; or (3) be regarded as a construction of the rules as not violating the limitation provision in the Enabling Act; or (4) be regarded indeed as a ratification, a confirmation and approval of the action of this court in promulgating the rules. So however the action be looked upon, the result was that the rules came to have the full force and effect of an act of Congress, and the argument is met that an order of court for a physical examination to be valid must have legislative authority.

In the cases of *Isbrandtsen-Moller Co., Inc.* v. *U. S., et al.*, 14 Fed. Supp. 407, 300 U. S. 140, and *Swayne & Hoyt, Ltd.* v. *U. S.*, 300 U. S. 297, this court had occasion to consider an Executive Order of doubtful validity made under the

Executive Department Reorganization Act of 1932, transferring the Shipping Board to the Department of Commerce. The order as entered was, in accordance with the terms of the statute, reported to Congress. Congress made no change, in it and moreover later in appropriation and other statutes recognized that the transfer had in fact been made. And this court held that whatever the doubt with reference to the validity of the initial order, the subsequent acts of Congress had ratified the action of the Executive Department, thereby giving it the full force and effect of an act of Congress.

In the case of *Swayne & Hoyt, Ltd.* v. *U. S.*, 300 U. S. 297, above quoted, this court said, at page 301:

> "It is unnecessary now to pass on the efficacy of the transfer by Executive Order, for we are of opinion that as Congress itself had power to abolish the Shipping Board and to require its functions to be performed by the Secretary, it had power to recognize and validate his performance of those functions even though their attempted transfer by Executive Order was ineffectual.
>
> "It is well settled that Congress may, by enactment not otherwise inappropriate, 'ratify * * * acts which it might have authorized,' see *Mattingly* v. *District of Columbia*, 97 U. S. 687, 690, and give the force of law to official action unauthorized when taken. * * * And we think that Congress, irrespective of any doctrine of ratification, has, by the enactment of the statutes mentioned, in effect confirmed and approved the exercise by the Secretary of powers originally conferred on the Shipping Board."

We are not arguing that, construing the limitation provision in the Enabling Act as *forbidding rules in the field of substantive law as contra-distinguished to procedural law,* a rule abridging substantive rights by invading that field could be made valid by an Act of Congress.

But we do argue that accepting counsel's contention that the limitation provision in the Enabling Act forbids *procedural rules affecting matters of substance or importance,* then a rule violating the limitation provision as thus con-

strued would be made valid by a subsequent Act of Congress; and in this instance Congress by accepting the rules without change confirmed and ratified them and thus gave them the full force and effect of an Act of Congress.

V.

The Contention of the Plaintiff as to the Meaning of Substantive Rights, If Adopted, Would Lead to Great Confusion and Nullify Many of the Rules of Civil Procedure.

The main objective that Congress and this court had in making the Federal Rules of Civil Procedure was to simplify a problem in its essense of great difficulty; that is, the functioning of a Federal Court system alongside of the systems in operation in the forty-eight states.

The adoption of the suggestion made by the petitioner would, we submit, not only defeat this main objective but would render an already complicated subject, far more complicated than it was before the rules were attempted.

This is demonstrated by a moment's looking backward at the history of the propositions that the Federal Courts in matters of substantive law are bound by the laws of the State where the cause of action arose and in matters of procedure are bound by the Federal statutes.

With reference to substantive law, as pointed out by this court in *Erie R. R.* v. *Tompkins,* 304 U. S. 67, the decision in *Swift* v. *Tyson,* 16 Pet. 1, construing the Rules of Decision statute of 1789 to apply only to statutory and not to decisional law, led to a great deal of confusion. Also, as has been pointed out in the many discussions that have taken place both before and after the enactment of the Rules Enabling Act, the many questions and decisions coming up under the Conformity statute led to a great deal of confusion in matters of procedure.

But now at last by virtue of *Erie* v. *Tompkins*, 304 U. S. 64, the Rules Enabling Act, and these rules adopted by this court, the entire problem has been materially simplified. First, the laws as to substantive rights involved in any litigation before the Federal Court are to be governed by the laws, both statutory and decisional, of the State where the cause of action arose. Second, the procedure in that litigation is to be governed by uniform rules applicable to all Federal Courts wherever located.

The quotation by counsel (Suppl. Brief, p. 8) from the article by Judge Charles E. Clark (8 George Washington Law Review 1238, 3 Federal Rules Service, Law Review P. 33-1), entitled "Procedural Aspects of the New State Independence" makes no distinction between different categories of procedural regulations. Reference to the context of the article will demonstrate that the author was discussing the question whether burden of proof was a matter of procedure or substantive law. Hence, counsel's contention that the limitation provision in the Enabling Act makes a distinction between different categories of procedure finds no support in this quotation. On the contrary, Judge Clark in the opening paragraphs of the article repudiates the contention and sums up his objections as follows:

> "If, on the other hand, we try to say that anything possessing an element of substantive law is beyond the federal rules, the result is staggering. The number of the federal rules about which such issue may be raised is indeed large." (P. 1234.)

And even conceding that here as in every field of law there are twilight zones, we submit that the difficulties that may arise in close cases are more fanciful than real and that the line between substantive law and procedural law is, practically speaking, a very clear one. However be that as it may, the fact remains, that the simplest line of demarcation that can be drawn is between substantive law on the one hand and procedural law on the other.

But in the case before this court, the court is asked by counsel for the petitioner to adopt an entirely new theory and place the line dividing with reference to the rule making power, not between substantive law and procedural law but between two classes of procedural law. One of these, according to the conception of counsel for the petitioner, would include ordinary matters and be within the rule making power. The other would include substantial and important matters and not be within the rule making power. Such a theory would, we submit, lead to hopeless conflict and confusion and make the matter of practice and procedure in the Federal Courts far more confusing than it was before the rules were promulgated. The dividing line is far less clearly defined and the practical application of such a standard is too difficult to consider.

Moreover, any such theory would nullify a great many of the 87 Rules of Civil Procedure. A casual review of merely the headings of those rules will show how very many deal with substantial and important matters as those terms are used by counsel for the petitioner. In fact, there is hardly any rule which a litigant could not argue violates some substantial and important right under this theory.

In truth, we respectfully suggest that if the theory of petitioner's counsel be adopted then, to borrow an expression found in one of the opinions of this court,

> "The attempted distinction • • • will plunge this branch of the law into a Serbonian Bog." (*Landress* v. *Phoenix Ins. Co.*, 291 U. S. 491, 499.)

VI.

With Reference to Petitioner's Claim That the Substantive Character of the Right Modified by Rule 35 is Indicated by the Questions of Legislative Policy Involved in the Promulgation of the Rule.

The plaintiff, pursuing her argument that the right of privacy is an important and substantial right, contends that Rule 35 is solely for the benefit of defendants and not plaintiffs, and, in fact, discriminates against plaintiffs (p. 43). We submit that there is not only no discrimination but that the rule is reciprocal. In view of the fact that without an act of the legislature given directly or through authorized rules of a court a plaintiff in a personal injury case can hide behind an assertion of modesty and privacy and refuse to permit an examination which would prove or disprove a claimed injury, an act of the legislature or rule of court requiring such an examination is merely corrective and an equalization of the position of the parties. There is no discrimination.

In fact, such a rule work both ways. For while it is, of course, true that an examining physician appointed by the court by that very fact acquires a standing before a jury, and his testimony against the plaintiff (as counsel for the plaintiff assume it will be), will be most telling, it is also true that his testimony would be against the defendant if the facts were as claimed by the plaintiff, and in that case the plaintiff would be at a decided advantage and the defendant at a decided disadvantage. Conceded that the ultimate objective of a trial, irrespective of the parties' attitude, is the truth, this rule aims to accomplish that purpose, whomever the truth may hurt.

In this connection we refer the court to a most exhaustive and scholarly discussion of the matters involved in this rule by Dean Wigmore in his work on Evidence,

Third Edition, Par. 2220. Mr. Wigmore treats the matter under the heading of "Testimonial Privileges".

> "§ 2216. (8) Witness' Body, Chattels, or Premises; Exhumation of Corpse. The testimonial duty (*ante*, §§ 2192-2194) includes every form of disclosure which may assist in the ascertainment of the truth. It is not confined to utterances of the voice. It extends to documents (*ante*, § 2200). It extends also to the human body and to chattels and premises possessed. Apart from any one of the specific privileges already examined, is there ground for claiming a privilege to decline testimonial disclosure in any form other than that of speaking words or producing documents?
>
> The answer must be in the negative:" (Pages 167-168.)

* * * * * *

> "§ 2200. Same: (c) Corporal Exhibition. (A) Duty to Exhibit and Power to Compel. The duty to bear witness to the truth, by whatever mode of expression may be appropriate, includes necessarily the duty to exhibit the physical body, so far as the ascertainment of the truth requires it (*ante*, §§ 2194, 2216). When a civil party's privilege at common law is abolished, why does he not come within this application also of the general testimonial duty, and become compellable to disclose to the tribunal such facts as are ascertainable by inspection of his body."

We have touched upon this subject in view of counsel's statement as to a legislative policy being involved for the purpose of showing that such policy does not exist. It does not seem to us to be properly an issue in this cause, as the sole question here is whether the rule as promulgated is a valid rule.

Respectfully submitted,

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APPENDIX.

Rules Enabling Act. Act of June 19, 1934. Ch. 651. 28 U. S. C. A. §§ 723(b), 723(c).

"Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

SECTION 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session. (Act of June 19, 1934, c. 651, §§ 1, 2 (48 Stat. 1064), U. S. C., Title 28, §§ 723b, 723c.)

Conformity Act. Revised Statutes, § 914. 28 U. S. C. A. § 724.

"Conformity to practice in State courts. The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding. (R. S. § 914.)"

Rules of Decision Act. Revised Statutes, § 721, 28 U. S. C. A. § 725.

"Laws of States as rules of decision. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply. (R. S. § 721.)"

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 28.

HERTHA J. SIBBACH,

Petitioner,

vs.

WILSON & COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF WILLIAM D. MITCHELL, AMICUS CURIAE.

WILLIAM D. MITCHELL,
Amicus Curiae.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 28.

HERTHA J. SIBBACH,

Petitioner,

vs.

WILSON & COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF WILLIAM D. MITCHELL, AMICUS CURIAE.

Question Presented.

This case involves the validity of Rules 35 and 37 of the Rules of Civil Procedure for the District Courts of the United States, Rule 35 providing that where the physical condition of a party is in controversy the court may require him to submit to a physical examination, and Rule 37 prescribing the consequences of failure to comply with the order.

The question is whether these rules deal with matters of practice and procedure, and are within the power of this Court to promulgate, or whether they attempt to prescribe substantive law, or alter substantive rights and are therefore void.

Statement.

This action was commenced in the District Court of the United States for the Northern District of Illinois, Eastern Division, to recover damages for personal injuries to the petitioner, a plaintiff below. She alleged in the complaint that she had suffered severe bodily injuries.

The respondent (defendant below) filed an answer denying these allegations. The defendant then filed a motion for an order requiring the plaintiff to submit to a physical examination by a physician or physicians to be appointed by the court to determine the exact nature and extent of the injuries in controversy, and the court ordered the plaintiff to submit to a physical examination by a physician appointed by the court, to be conducted at his office.

The plaintiff having refused to submit to such an examination, the defendant obtained from the court an order to show cause why she should not be punished for contempt for disobedience of the order. The plaintiff, in response to the order to show cause, appeared and contended that the court was without power to require her to submit to a physical examination, and that the order to that effect was void. The court thereupon made an order adjudging the plaintiff guilty of contempt because of her disobedience of the order for a physical examination, and directed that she be committed to jail until she complies with that order, or until she is otherwise legally discharged from custody.

From the order committing her for contempt, plaintiff appealed to the Circuit Court of Appeals, which upheld the validity of the rules of civil procedure providing for physical examination of parties and affirmed the judgment, whereupon she sought and obtained a writ of *certiorari* from this Court.

At no time in the course of the litigation either in the District Court or the Circuit Court of Appeals, or in the petition for *certiorari* in this Court, has the petitioner claimed that commitment for contempt, to enforce an order for a physical examination, is not authorized by the rules of civil procedure.

The point has not been made the subject of an assignment of error in this Court.

So far as the record shows, it seems to have been assumed by the parties and by the courts below that physical coercion of the petitioner by imprisonment for contempt is provided for in the rules.

Statutes and Rules Involved.

The Act of June 19, 1934, authorizing this Court to prescribe rules of practice and procedure for civil actions in the District Courts, is as follows:

> "Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.
>
> Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules

the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session. [Act of June 19, 1934, c. 651, §§1, 2 (48 Stat. 1064), U. S. C., Title 28, §§723b, 723c.]"

The Rules of Civil Procedure in question are as follows:

"RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS.

(a) Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

Subdivision (b) of this rule relates to exchange of medical reports between the parties and is not material.

"RULE 37. REFUSAL TO MAKE DISCOVERY: CONSEQUENCES.

(a) Refusal to Answer. If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned,

as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) Failure to Comply With Order.

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a)

of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for

disobeying any of such orders *except an order to submit to a physical or mental examination.*" (Italics supplied.)

Subdivisions (c), (d), (e) and (f) of this rule are not material here.

Summary of Argument.

I. The question as to the validity of the rules should not be determined on the assumption that they authorize any physical coercion by imprisonment or otherwise to enforce an order for physical examination. They expressly prohibit resort to such means.

II. The rules, properly construed, are procedural, do not alter the substantive law and are valid.

By the Enabling Act of 1934 the Congress intended to confer upon the Court all the power respecting rules that it could constitutionally confer.

Union Pacific Railway Company v. *Botsford*, 141 U. S. 250; *Camden & Suburban Railway* v. *Stetson*, 177 U. S. 172, do not require the conclusion that Rules 35 and 37 prescribe rules of substantive law.

III. The disposition to be made of this case should be such as to make it clear that this Court is not approving the use of contempt proceedings to enforce obedience, but as error has not been assigned to that method of enforcement, there is no reason to reverse on that ground without passing on the question raised by the petition for *certiorari* as to the validity of the rules.

Argument.

I.

The question as to the validity of the rules should not be determined on the assumption that they authorize any physical coercion by imprisonment or otherwise to enforce an order for physical examination. They expressly prohibit resort to such means.

Before deciding whether a rule infringes substantive rights or is a procedural regulation, it is important to know what the rule prescribes and how it operates.

The parties and both courts below have dealt with this case on the assumption that obedience to an order for physical examination may be coerced by arrest and imprisonment for contempt.

The rules expressly prohibit such coercive methods.

Rule 35 merely authorizes an order for examination and is silent as to the consequences of disobedience. Rule 37 prescribes those consequences. It applies to all refusals to make discovery. It includes not only refusals to answer interrogatories or to give testimony or to answer questions, to produce documents for inspection, to permit entry upon land or other property, but also refusal to submit to a physical or mental examination. Subdivision (a) of Rule 37 makes no provision respecting refusal to submit to a physical examination. Subdivision (b)(1) provides for treating as a contempt of court refusal to answer questions after being directed so to do but has no application to orders for physical examination. Subdivision (b)(2) of Rule 37 deals generally with "other consequences" of refusals to answer, to produce or to submit to physical examination. It pro-

vides that in any of such cases "the court may make such orders in regard to the refusal as are just, and among others the following:". Paragraphs (i), (ii) and (iii) provide that in case of such refusals the issue of fact shall be taken as determined against the person refusing, or the disobedient party may be prohibited from offering evidence on the point or from introducing evidence of physical or mental condition, or his pleadings may be stricken out or proceedings stayed until the order is obeyed, or the action may be dismissed or judgment rendered by default against the disobedient party. So far there is no authority for contempt proceedings, except for refusal to answer a question when directed so to do by the court.

As a consequence of disobedience paragraph (iv) provides:

> "In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders *except an order to submit to a physical or mental examination.*" (Italics supplied.)

We thus find there is no express provision anywhere in the rule for contempt proceedings directed at a party who refuses to obey an order for physical examination. Although the provision in subdivision (b)(2) describing "other consequences" states that "the court may make such orders in regard to the refusal as are just", and, taken alone, it would be subject to the claim that it impliedly authorizes contempt proceedings for disobedience of an order for physical examination, we find in that same subdivision, in paragraph (iv) providing for the arrest of

any party disobeying any of such orders, the express exception that the coercive method of arrest shall not be used in the case of an order to submit to a physical or mental examination.

It is plain from the terms of the rule that for disobedience of an order for physical examination there is no "compulsory stripping and exposure" of a person, nor any physical coercion by arrest or commitment for contempt, and the party against whom an order for examination is made is left free to refuse, and the consequences which follow such refusal are to have the fact taken against him or to be prohibited from introducing evidence on the point or to have the proceedings stayed until the order is obeyed, or finally the dismissal of his action or the rendering of a judgment by default.

If more were needed to support this interpretation of the rule, it will be found in the record of the proceedings of the Advisory Committee, and the facts stated below are all taken from that record.

The first tentative draft of the rules respecting physical and mental examination of persons was submitted to the Advisory Committee in November, 1935. A copy of that draft is found in the appendix to this brief at page 27. It provided that physical examination could be ordered not only of a party to the action, but of persons not parties, and a tentative draft of what was then Rule 65 was also submitted, a full copy of which is found at page 27 of the appendix to this brief. The draft expressly provided that on refusal to obey an order for physical or mental examination, the person refusing, whether or not a party to the action, was subject to arrest and punishment for contempt.

Extracts from the reporter's transcript of the proceedings of the Committee on the consideration of this preliminary draft are set forth in the appendix hereto at page 28.

That transcript discloses that members of the Advisory Committee immediately raised doubts as to whether forcible means could be used to compel either a party, or person not a party, to submit to a physical examination.

The conclusions of the Advisory Committee were expressed in the statement of the chairman to the draftsman at the conclusion of the discussion, as follows:

> "You understand that we agreed that the penalty for failure to comply with an order for physical examination should not be contempt?
>
> Mr. Sunderland. Should not be contempt—yes."

Having determined that physical coercion should not be used to enforce an order for such examination, the Committee likewise struck out the provision that orders for physical examination could be directed at persons not parties because the methods prescribed for enforcement against a party, such as having the fact taken against him or his suit dismissed, were not available in the case of a person not a party.

At a subsequent meeting of the Advisory Committee early in 1936, Mr. Sunderland, produced a revised draft dealing, among other things, with the consequences of refusal to obey an order for physical examination. That tentative draft is set forth at length in the appendix hereto at page 36. After providing for various consequences of refusal, such

as having the fact taken against him, or having his suit dismissed or postponed. the draft wound up with the following provision:

> "and (9) the court may, in lieu of any of the foregoing orders, or in addition thereto, order the arrest of any party or agent of a party for disobeying any of such orders *except an order to submit to a physical or mental examination.*" (Italics supplied.)

That tentative draft, after further revision, is embodied in what is now Rule 37.

The principal purpose of this brief is to make sure that in passing upon the validity of these rules the attention of the Court is directed to the fact that they expressly prohibit any physical coercion of any kind for enforcement of an order for physical examination, and that the consequences of disobedience of such an order, being a refusal of the party involved to aid the court in ascertaining the facts, are limited to having the fact taken against the recalcitrant party or to having his case postponed, or, in proper situations, finally dismissed, or to having judgment entered by default.

II.

The rules, properly construed, are procedural, do not alter the substantive law and are valid.

The briefs of the parties ably deal with this proposition, but it is not out of place here to emphasize some of the controlling arguments.

The one respect in which the system of court-made rules is vulnerable, lies in the necessity for regarding the distinction between procedure and substantive

law. If the Court now adopts a narrow view as to what is procedural, not only the rules here in question but many others will fall. So much confusion will follow that the result may be to force an abandonment of the system and a return to legislative codes of procedure, where the distinction between procedure and substantive law is unimportant.

1. BY THE ENABLING ACT OF 1934 THE CONGRESS INTENDED TO CONFER UPON THE COURT ALL THE POWER RESPECTING RULES THAT IT COULD CONSTITUTIONALLY CONFER.

In this case the cause of action arose in Indiana and the substantive law of that State is to be applied. The action was brought in Illinois. The law of Indiana provides for physical examination of parties. The Illinois law does not. In order to invoke the Illinois law (the law of the forum) the petitioner asserts (p. 54, Petitioner's Brief on Petition for Certiorari):

> "Thus, no matter how an order for a compulsory physical examination may be classified in determining whether or not it modifies the substantive rights of a litigant, it is clear that it is classified as a rule of procedure within the rule that the law of the forum governs procedure. The law of Indiana has no bearing on the validity of the order involved in the instant case."

To supplement this contention petitioner asserts that the enabling Act of 1934 did not confer power to make all procedural rules, and that the all-inclusive provision that this Court may prescribe "practice and procedure" is limited by the provision that the rules "shall neither abridge, enlarge, nor modify the substantive rights of any litigant". The argument is that

although a rule is truly procedural and does not change the substantive law, it does not follow that the Court may promulgate it, for otherwise the prohibition of rules affecting substantive rights would be surplusage. The author of this brief is quoted (Petitioner's Brief, p. 28) as saying at the Cleveland Institute Proceedings, page 182, that the clause about substantive rights is surplusage. The statement then made was as follows:

> "This statute provides that the rules shall relate to pleading practice and procedure, and that they shall not affect substantive rights, of the litigant. That last phrase is probably surplusage. If it had said 'pleading practice and procedure' and stopped there, that would have excluded substantive rights, and furthermore constitutional limitations would have prevented the Congress, even if it had tried, from delegating to the courts power to make rules of substantive law.
>
> This problem at first approach seems difficult. The Advisory Committee found very little difficulty with it. It is astonishing how many decisions there are in the Supreme Court and other courts which define the differences between procedure, on the one hand, and substantive rights on the other. There are some problems that have arisen under these rules and continue to be present, but they are very few in number."

There is no reason to change that statement.

Section 2 of the Enabling Act, dealing with union of law and equity procedure, states:

> *"Provided, however,* That in such union of rules the right of trial by jury as at common law

and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate."

No one would claim that this proviso is not surplusage. It is a mere reminder that under the Constitution no rule could impair the right to a jury trial, just as the limitation in Section 1 is a reminder that under the Constitution the Congress may not delegate to the courts the power to change the substantive law.

Anyone familiar with legislative practice knows that to forestall objections or amendments, unnecessary provisions often are inserted which make no change in the effect of the law.

To sustain the view that the enabling act does not authorize this Court to prescribe all rules of practice and procedure, but only those which do not "affect" substantive rights, would result in hopeless difficulty in testing the validity of rules.

What is a rule of practice or procedure which affects substantive rights? How define the difference between a rule of practice or procedure which "affects" substantive rights and one which does not?

There is hardly a rule of practice or procedure in the new Federal Rules which does not to some extent affect the enforcement of substantive rights. The rule requiring a defendant to answer in twenty days, and on his failure to do so, allows judgment against him by default and without proof, is a rule of practice or procedure. Yet failure to comply may result in complete loss by defendant of substantive rights.

The contention that the enabling act forbids *rules of practice or procedure* which affect substantive rights must be rejected.

Again it is suggested in the briefs that if the enabling act does not ban all rules of *practice or pro-*

cedure which affect substantive rights, it at least forbids rules of practice or procedure which affect "important" rights, and that although the rules here in question do deal with procedural matters, the Congress did not intend to allow this Court to promulgate rules of practice or procedure involving "broad and important questions of policy".

Such a conclusion would require the courts to examine each rule of practice and procedure and determine whether or not it deals with matters involving broad and important questions of policy.

Such an interpretation of the enabling act is inadmissible. The provision respecting rules altering the substantive rights of litigants should not be so construed.

The Act of 1934 leaves to this Court full power to make rules of practice and procedure, without regard to what had been the previous practice established by statute. The expressed limitations as to altering substantive rights and denying a right to jury trial add or subtract nothing. This power left with this Court is subject only to the limitation that the united rules shall not be effective until the Congress has had a look at them with opportunity to reject them if it finds that they are objectionable for reasons of public policy or on any other grounds.

The ultimate question is whether Congress, is prevented by the Constitution from leaving to the Court the power to prescribe Rules 35 and 37.

Substantive law fixes the rights of parties on a given state of facts. Practice and procedure include the steps which may be taken by a court to ascertain the facts on which the rights of the parties depend. The decisions, both State and Federal, cited in the other briefs, make it clear that a rule requiring a

party whose physical condition is in controversy to submit to a physical examination, under suitable conditions, on pain of having the fact taken against him or losing his case if he refuses thus to aid the court in ascertaining the truth,—is a matter of procedure and not of substantive law.

2. *Union Pacific Railway Company* v. *Botsford*, 141 U. S. 250; *Camden & Suburban Railway* v. *Stetson*, 177 U. S. 172, DO NOT REQUIRE THE CONCLUSION THAT RULES 35 AND 37 PRESCRIBE RULES OF SUBSTANTIVE LAW.

In the *Botsford* case, an action for personal injury tried in the Circuit Court of the United States in Indiana, this Court held that the Circuit Court was without power to order the plaintiff to submit to a surgical examination in advance of trial, but the Court did not hold that substantive rights were involved, as distinguished from procedure. On the contrary, the opinion deals with the point as if it were a procedural matter. The Court assumed that the power to make orders for physical examination may rest

1, on common law practice;

2, on acts of Congress authorizing it;

3, *on State practice adopted by Congress for the Federal Courts by the Conformity Act.*

It held (1) that there was no such practice at common law; (2) that there was no act of Congress authorizing it; (3) that the Conformity Act, Sec. 914 R. S., did not establish the practice in the Federal court in Indiana, first, because it did not satisfactorily appear that such a practice existed in the State courts,

and, second, because the Conformity Act should not be construed to transplant such a practice to the Federal courts, and so to construe it would raise a conflict with acts of Congress which expressly fixed the modes of proof in Federal courts.

The distinction between substantive law and procedure was not really involved, but the opinion plainly treats the question as one of procedure, regulated or affected by procedural statutes.

In the *Stetson* case the action was for damages for personal injuries. The situation differed from the *Botsford* case in that New Jersey where the case was tried had a statute clearly authorizing the State courts to make orders for physical examination. The Court said that no act of Congress regarding modes of proof prohibited orders for such examinations or the use of the testimony of the examining physician. (In this respect the opinion seems in conflict with that in the *Botsford* case and is probably right.) The opinion then states that there was a statute of the United States which made the New Jersey statute applicable in the Federal courts, and cited the rules of decision statute (Sec. 721 R. S.; Title 28 §725 U. S. C.), not the "Conformity" statute. (Sec. 914 R. S.; Title 28, §724 U. S. C.). The only thing in the *Stetson* decision to suggest that the Court considered the question one of substantive law is the reference to the rules of decision statute, instead of to the Conformity statute.

In contrast, the Court in the *Botsford* case treated the Conformity Act as the one having a bearing. Furthermore, in the *Stetson* case the Court did say that the matter was one to be regulated by act of Congress. If it were considered a matter of substantive law rather than procedure, that statement would

not have been made. *The fact is that the question whether physical examination involves substantive law or procedure was not involved in the Stetson case,* and a decision on that point was not necessary to a decision of the case, because the cause of action arose in New Jersey and the case was tried in a United States Circuit Court in that State. The decision is not authority for the proposition that requirement of a physical examination is a matter of substantive law.

Although in the two cases above discussed the Court indicates that a Federal statute was necessary to authorize a physical examination in a Federal court, it does not follow that the system may only be established by a statute.

When the *Botsford* and *Stetson* cases were decided, court-made codes of procedure were not in use. Procedural systems were common law or statutory, and as common law practice did not provide for physical examinations in the Federal courts, authorization of the practice required a statute, *i. e.*, an act of Congress installing it directly, or indirectly by adopting the State practice.

Here Rules 35 and 37, if procedural, have the effect of a statute. They are authorized by a statute which leaves rules of procedure to this Court, and provides that the rules adopted by it shall supersede existing statutes. The situation, legally, is precisely the same as if the Congress had adopted a code of procedure containing a provision identical with Rules 35 and 37.

These rules have been held valid in two other cases: *Countee* v. *United States,* 112 F. (2d) 447 (C. C. A. 7th Circuit), and *Beach* v. *Beach,* 114 F. (2d) 479 (U. S. C. A. Dist. of Columbia).

Those decisions give considerable weight to the fact that this Court, when it promulgated the rules,

presumably was of the opinion that they are valid. Any such conclusion was reached *ex parte*. In a justiciable case or controversy, it is obvious that the Court in the discharge of its constitutional functions must reexamine the question. It is proper enough for a lower court to assume that this Court would not have promulgated a rule it thought invalid, but that argument has no weight when a case reaches this Court. Those decisions also give weight to the fact that the Congress refrained from "vetoing" the rules. The conclusion that this non-action is equivalent to affirmative legislation approving the rules, is inadmissible. Yet it is fair to say that if the narrow interpretation of the enabling act urged by petitioner conforms to the intention of Congress, the law making body would not have allowed the rules to go into effect because so many of them would have appeared to go beyond this Court's power. Therefore, non-action by the legislative branch does tend to confirm the view that by the enabling act the Congress intended to leave to this Court the broadest power permitted by the Constitution.

The opinions in the *Botsford* and *Stetson* cases justify one further comment. They lay great stress on the sanctity of the person and the affront to modesty by physical examination. In his dissenting opinion in the *Botsford* case Mr. Justice Brewer said (pp. 258-259):

> "Mr. Justice Brown and myself dissent from the foregoing opinion. The silence of common law authorities upon the question in cases of this kind proves little or nothing. The number of actions to recover damages, in early days, was, compared with later times, limited; and very few

of those difficult questions as to the nature and extent of the injuries, which now form an important part of such litigations, were then presented to the courts. If an examination was asked, doubtless it was conceded without objection, as one of those matters the right to which was beyond dispute. Certainly the power of the courts and of the common law courts to compel a personal examination was, in many cases, often exercised, and unchallenged. Indeed, wherever the interests of justice seem to require such an examination, it was ordered. The instances of this are familiar; and in those instances the proceedings were, as a rule, adverse to the party whose examination was ordered. It would be strange that, if the power to order such an examination was conceded in proceedings adverse to the party ordered to submit thereto, it should be denied where the suit is by the party whose examination is sought. In this country the decisions of the highest courts of the various States are conflicting. This is the first time it has been presented to this court, and it is, therefore, an open question. There is here no inquiry as to the extent to which such an examination may be required, or the conditions under which it may be held, or the proper provisions against oppression or rudeness, nor any inquiry as to what the court may do for the purpose of enforcing its order. As the question is presented, it is only whether the court can make such an order.

The end of litigation is justice. Knowledge of the truth is essential thereto. It is conceded, and it is a matter of frequent occurrence, that in the trial of suits of this nature the plaintiff may make in the courtroom, in the presence of the

jury, any not indecent exposure of his person to show the extent of his injuries; and it is conceded, and also a matter of frequent occurrence, that in private he may call his personal friends and his own physicians into a room, and there permit them a full examination of his person, in order that they may testify as to what they see and find. In other words, he may thus disclose the actual facts to the jury if his interest require; but by this decision, if his interests are against such a disclosure, it cannot be compelled. It seems strange that a plaintiff may, in the presence of a jury, be permitted to roll up his sleeve and disclose on his arm a wound of which he testifies; but when he testifies as to the existence of such a wound, the court, though persuaded that he is perjuring himself, cannot require him to roll up his sleeve, and thus make manifest the truth, nor require him in the like interest of truth, to step into an adjoining room, and lay bare his arm to the inspection of surgeons. It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration; and if in other cases in the interests of justice, or from considerations of mercy, the courts may, as they often do, require such personal examination, why should they not exercise the same power in cases like this, to prevent wrong and injustice?

It is not necessary, nor is it claimed, that the court has power to fine and imprison for disobedience of such an order. Disobedience to it is not a matter of contempt. It is an order like those requiring security for costs. The court never fines or imprisons for disobedience thereof. It simply dismisses the case, or stays the trial

until the security is given. So it seems to us that justice requires, and that the court has the power to order, that a party who voluntarily comes into court alleging personal injuries, and demanding damages therefor, should permit disinterested witnesses to see the nature and extent of those injuries in order that the jury may be informed thereof by other than the plaintiff and his friends; and that compliance with such an order may be enforced by staying the trial, or dismissing the case.

For these reasons we dissent."

Conditions have changed materially in the fifty and the forty years since the *Botsford* and *Stetson* cases were respectively decided. Medical and surgical sciences have immensely improved. It has become almost universal for those suffering from physical ailments to undergo complete clinical examinations as a basis for diagnosis. Millions of people subject themselves at frequent intervals to physical examinations as a precautionary measure. The conditions under which such examinations are now made by physicians and surgeons, assisted by trained nurses, have greatly improved. Plaintiffs in personal injury cases universally subject themselves to examinations by physicians of their own choosing. In most of the states, examinations made at the instance of adversary parties are allowed and rarely is it necessary to apply to a court for an order. We have become so accustomed to these practices that physical examinations conducted under proper conditions are taken for granted and are no affront to privacy or shock to modesty. The reasoning of Mr. Justice Brewer fifty years ago is infinitely more persuasive under present conditions.

III.

The Disposition To Be Made of This Case.

If the Court holds the rules invalid, doubtless its action would be to reverse the judgment on that ground.

On the other hand, if Rule 35 is held valid, a question arises as to the disposition of the case, because of the fact that the order of commitment for contempt is not authorized by Rule 37.

It would be unfortunate, not only for both parties to this cause, but from the standpoint of the public interest, to have the judgment reversed on the narrow ground that contempt proceedings are unauthorized, without a decision on the question of the validity of the rule authorizing physical examinations. The use of contempt proceedings as a means for enforcing obedience to the order for examination was not raised in the trial court or in the Court of Appeals and has not been made the subject of any assignment of error, or in any other way questioned in the petition for *certiorari*.

On the other hand, the petition does squarely raise the question as to the validity of the rule providing for physical examinations at the instance of an adversary, and doubtless the Court understood, when it granted the writ, that was the only question presented.

Under these conditions the Court, if it holds the rule valid, may affirm, ignoring the fact that the rule does not authorize commitment for contempt, but such a course may cause misunderstanding as to the propriety of contempt proceedings in such a case. In discussing the validity of the rule, the Court may

have occasion to refer to the fact that the rule does not authorize arrest or physical compulsion.

Two courses are open if the rules are held valid. Either

1. Affirm the judgment with the explanatory statement that Rule 37 does not authorize contempt proceedings, and that the affirmance should not be interpreted as approving such proceedings, but results from the fact that no error was assigned on the point and the petitioner has not desired to make the point; or

2. Hold the rules valid but order the judgment of commitment for contempt vacated on the ground that contempt proceedings are not authorized by Rule 37, without prejudice to resort by the respondent to other appropriate means of imposing on the petitioner the consequences of further refusal to obey the order for examination.

Respectfully submitted,

WILLIAM D. MITCHELL,
Amicus Curiae.

November, 1940.

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APPENDIX.

(Tentative Draft, Part Two; October 16, 1935
(Confidential—Not Published.

F. *Physical and Mental Examination of Persons.*

Rule 63. *Application and Order.* In any civil action at law or in equity, in which the physical or mental condition of a person residing in the United States is material to the question of rights, liabilities, damages or relief involved in said cause, either party shall be entitled, at any time, on application to the court in which the cause is pending, and on reasonable notice to the adverse party or his attorney of record, and to such person if he is not an adverse party, to an order for the examination of the physical or mental condition of such person, at such time and place, in such manner, by such persons, and under such conditions, as the court shall designate in such order.

H. *Penalties.*

Rule 65. *Powers of the Court.* (a) An attachment may be issued by the court against any person guilty of contempt of court in connection with the taking of any deposition either by oral examination or written interrogatories, or by reason of refusal to obey any order for inspection of documents or things or for the physical or mental examination of the person, whether or not such person is a party to the action.

(b) Where any party to the action is guilty of such contempt, the court may, in a proper case, in addition to, or in substitution for, such attachment, make an order (1) dismissing the action, or (2) striking out any pleading and rendering judgment in default of

such pleading, or (3) striking out any part of a pleading, or (4) denying a party the right to support or oppose any claim or defense with respect to which the examination or inspection was required, or to testify or offer evidence in regard thereto, or (5) requiring certain facts to be admitted for the purpose of the action, or (6) prohibiting the introduction in evidence of certain books, documents or things. or (7) staying further proceedings until the party shall have submitted to the examination desired; or (8) prescribing any other matter in the premises which justice may require.

Physical and Mental Examination of Persons

Rule 63—Application and Order

Mr. Mitchell. Rule 63—physical and mental examination of persons.

Mr. Wickersham. That includes not only parties but third persons.

Mr. Sunderland. Yes; it does.

Mr. Wickersham. And I was just wondering where we would get that. Here is an order for physical examination of a person who is not a party to the action.

Mr. Sunderland. That would be a very rare case, but the mental condition of such a person might be involved, because somebody might claim derivative title through an incompetent person.

Mr. Wickersham. Do you find that in any statutes?

Mr. Sunderland. As applied to one not a party?

Mr. Wickersham. One not a party.

Mr. Sunderland. I do not think so.

Mr. Mitchell. You cannot enforce against a third party. You cannot enforce it against a party to the action by compelling him to submit. The only penalty

you can put on him is a dismissal of his case, or presuming the fact to be true.

Mr. Lemann. Would not this be a contempt?

Mr. Mitchell. *You cannot force any man, under the Constitution, to exhibit his person; can you? He may lose his suit if he does not; but can you actually take the marshal and drag him in and put him in jail if he does not?*

Mr. Lemann. In the case where you require him to produce the automobile or some other thing which he considers his own business, if he does not do it, somebody thought it would be an unreasonable search and seizure to sentence him for contempt; did they not?

Mr. Sunderland. Yes.

Mr. Mitchell. Perhaps you are making a distinction between an automobile and a man.

Mr. Wickersham. A good many automobiles are worth more than some men.

Mr. Lemann. When the question is whether or not X is crazy, we would say, "We should like to examine X's father to see if he did not have some hereditary disease which might be likely to transmit itself and cause this insanity in X. Here, Mr. X's father: You come and submit yourself for examination." That is rather an obnoxious case.

Mr. Sunderland. Yesterday, when we spoke about things absurd on their face, I was thinking about this very item.

Mr. Wickersham. How often would you want to have a physical examination of somebody who was not a party to the action?

Mr. Sunderland. I do not know that you ever would.

Mr. Wickersham. I think it would be better to leave it out, because it will occur so very rarely.

Mr. Sunderland. And probably leave the other out on general principles.

Mr. Lemann. I think it would give fuel on which to attack.

Mr. Wickersham. I think you had better leave it out as applying to such person who is not an adverse party.

Mr. Dobie. There should be a provision for a reasonable showing there, too, I think.

Mr. Clark. Do you not want to put in aliens when you catch them here? This is unreasonable discrimination in favor of aliens.

Mr. Sunderland. This excludes witnesses entirely. This physical examination of parties works beautifully when it gets going. We have it in Michigan just as a matter of course. In every case, in the pre-trial docket, the judge says, "Whom do you want to make the physical examination?" The parties are both there. They name some doctor. "All right; that is the order."

Mr. Cherry. We do not even go to court about it.

Mr. Sunderland. They have to go to court on the pre-trial docket, but it is just a matter of course. It is a beautiful practice.

Mr. Dobie. I understand you are limiting this now to parties.

Mr. Sunderland. Yes.

Mr. Dobie. You want to put the reasonable showing in here, too; do you not think so—the same thing we had in the other?

Mr. Sunderland. Wherever the "physical or mental condition" of a party "is material to the question of rights, liabilities, damages," etc.—it is always material.

Mr. Dobie. You do not think that is necessary there?

Mr. Cherry. What about the penalty of dismissal of the action? Is not that commonly included in the sections?

Mr. Sunderland. I do not know just what you would show, except that it was material. You would have to show materiality to make the rule out of it.

Mr. Cherry. Suppose you get your order, and it is not complied with—the point the Chairman raised a while ago: Would it not be wise to state the penalty for failure to comply?

Mr. Wickersham. You mean in Rule 63?

Mr. Cherry. Yes. You have your order, and there is no compliance. The penalty is usually dismissal; is it not? After all, the United States Supreme Court held, before you had an equity rule on the thing, that you could not do this. That is the case of *Union Pacific Railway Company* vs. *Botsford*.

Mr. Dobie. They held that it could be done if there was a State statute.

Mr. Cherry. I say, without those things it could not be done. The purpose of it is for use in a suit.

Mr. Sunderland. I do not see what harm it would do to put that in.

Mr. Cherry. I should say that was the primary thing. If he does not want to press his suit, he is not in any contempt of court. If his suit is dismissed, that is the end of the matter.

Mr. Sunderland. Dismissal or default, as the case may be.

Mr. Cherry. Dismissal or default, because of course it might be the defendant.

* * * * * * * *

Mr. Mitchell. As far as defendant is concerned, would you not simply give the court power to take the fact involved against the defendant, whatever it was, or something of that kind?

Mr. Sunderland. There would not be any fact involved here. It is a question of physical examination.

Mr. Wickersham. But what is the theory of the physical examination? To find out the extent of the

injuries, for example, in a personal injury case; to find out a man's mental capacity in case that were involved. The physical capacity must be an important factor in the case before you can get an order to examine him.

Mr. Mitchell. Suppose it is the defendant and not the plaintiff? If it is the plaintiff who refuses to comply with the order, the remedy is by dismissal. If it is the defendant, instead of ordering judgment against him, if he refuses to comply with an order, you can just assume the fact against him.

For instance, if he is defending on the ground that he is mentally incompetent to do a thing—a case of a guardian ad litem, for instance, or something of that kind—or was incompetent at the time the thing occurred, a physical examination of him may be material to determine whether his defense is good. If he refuses to comply, the fact may be taken against him. That is not lack of due process; is it? It is equivalent to an admission by him.

Mr. Donworth. Would it not be well, for the sake of passing this, to agree as far as we can along the lines of the Chairman's suggestion—first, that this be confined to parties; second, that in the case of a plaintiff dismissal of the suit shall result; and that the Reporter shall make an investigation of how far we can go in the case of a defendant?

Mr. Mitchell. If there is no objection, that will be understood.

PENALTIES

RULE 65—POWERS OF THE COURT

* * * * * * * * *

Mr. Mitchell. Are we agreed that it is competent to declare a man in contempt for refusing to submit to a physical examination?

Mr. Sunderland. It is only a party now.

Mr. Lemann. I should think it would be a contempt.

Mr. Wickersham. You have that decision in *Union Pacific Railroad* vs. *Botsford*.

Mr. Mitchell. What did it say?

Mr. Wickersham (reading): "The single question presented by this record is whether, in a civil action for an injury to the person, the court, on application of the defendant, and in advance of the trial, may order the plaintiff, without his or her consent, to submit to a surgical examination as to the extent of the injury sued for. We concur with the Circuit Court in holding that it had no legal right or power to make and enforce such an order."

Mr. Lemann. Is that 141 U. S.?

Mr. Wickersham. That is 141 U. S. 250.

Mr. Mitchell. That is because there was no statute permitting that.

Mr. Wickersham. It goes on to say: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."

Mr. Lemann. But in a later case where there was a State statute they held that the Federal Court could require it to be done.

Mr. Mitchell. I suppose they can penalize a man civilly for not doing it by dismissing him or defaulting him. I raised the question in my own mind whether you could put him in jail. He could stand on his rights and lose his lawsuit, in other words.

Mr. Cherry. Is not that typically the provision of State statutes?

Mr. Mitchell. Contempt?

Mr. Cherry. No; the other—default, or losing the fact?

Mr. Mitchell. That is what I say.

Mr. Cherry. This examination goes only to that. If he loses the fact, or his case is dismissed——

Mr. Mitchell. Why put him in jail?

Mr. Cherry. You have a complete remedy for the thing.

Mr. Lemann. I do not think the judge would ever put him in jail, but the question is presented whether he would have the power to do it.

Mr. Cherry. Your contempt is to force a man to do it. That is one of the purposes of contempt. Why should you have any right to force him if he is out on the fact as to which it is material?

Mr. Wickersham. That is especially true because this question would arise almost always in connection with the examination of the defendant.

Mr. Mitchell. The plaintiff.

Mr. Cherry. Physical examination of the plaintiff.

Mr. Wickersham. The plaintiff—yes; that is right.

Mr. Mitchell. In nine hundred and ninety-nine cases out of a thousand it is physical examination of the plaintiff. In fact, I never heard of a case where it was desired to inspect a defendant.

Mr. Wickersham. That is quite true. You are quite right.

Mr. Lemann. This rule would still remain with fair general application if you put in the preceding rule the statement that the penalty should be merely dismissal of suit.

Mr. Mitchell. You would strike out of this section the words "or for the physical or mental examination of the person".

Mr. Lemann. What would that leave the penalty of a defendant who refused to submit himself for examination?

Mr. Mitchell. He would lose the fact, as Mr. Cherry says. The fact involved would be taken against him.

Mr. Lemann. That is provided here, but I guess it is simpler to put it in the preceding rule.

Mr. Mitchell. No; this only says where the party is guilty of such contempt, and unless you make it contempt this would not cover it; so you have to have the thing put in the other rule. But my question is whether, having now provided that failure to comply with order for physical examination shall result in dismissal of the suit of the plaintiff, or loss of the fact if it is a defendant, it is either necessary or safe to go a step further and say that he shall be put in jail, too.

Mr. Dobie. I doubt it, and I think a lot of them would be much more ready to approve the rule if you cut that out.

Mr. Mitchell. Why do we not strike out "or for the physical or mental examination of the person" in the contempt section?

Mr. Dobie. I think that is the answer. If we make him lose it as to that suit, the other man has no complaint.

Mr. Sunderland. It might be better to handle it in some other way than to interfere with this section as I have it.

Mr. Mitchell. It would not interfere with it, except to strike out punishment by contempt for failure to obey an order for physical or mental examination. The whole section relates to contempt.

Mr. Dobie. Just exclude that from the definition.

Mr. Sunderland. Yes; that is true. I get the point; but I think it may work out better to draft it a little differently.

Mr. Dobie. We will leave that to you.

Mr. Mitchell. Is there anything further in Rule 65?

Mr. Tolman. One suggestion, Mr. Chairman. A communication from one of the committees suggests that all penalties be united together in Rule 65, instead of having some special penalties in certain other rules. I just wondered whether Mr. Sunderland has considered that suggestion.

Mr. Sunderland. I did not get that question.

Mr. Tolman. There has been a suggestion made by the Ohio committee that all penalties and sanctions be gathered together and put in Rule 65, instead of being put repeatedly in other sections.

Mr. Sunderland. Yes; I thought that would be a good thing to do. That is the reason I said I might not want to strike this thing out of Rule 65, but adjust the other rules.

Mr. Mitchell. You understand that we agreed that the penalty for failure to comply with an order for physical examination should not be contempt?

Mr. Sunderland. Should not be contempt—yes.

(Tentative Draft II—January 13, 1936
(Confidential—Not Published.

Rule 39. Consequences of Refusal to answer questions or give discovery. (a) Refusal by any party or witness to answer any question, if not made in good faith and with reasonable cause, may, where such party is under subpoena, be deemed a contempt of the court from which the subpoena issued, committed by the refusing party or witness or by the party or attorney advising such refusal, or by all of them.

(b) In case of the refusal of any party or witness to answer any questions, whether the deponent is under subpoena or not, the proponent of the questions may either complete the examination or immediately adjourn the same, and thereupon, on reasonable notice to the persons concerned, may apply to the court from which the subpoena issued, for an order compelling such answers, which order, if granted, shall also require that there be paid to the examining party, by the refusing party or witness or by the party or attorney advising such refusal, or all of them, as shall be just, the amount of the reasonable expense incurred by the examining party by reason of the

necessity for obtaining the order compelling such answers, including reasonable attorney fees. Such application or order shall not affect the liability of the party, witness, or attorney for contempt of court.

(c) Where a request has been served upon any party for a descriptive list of documents or things, no item which should have been, but is not, listed, and no item which is listed as one which the party is unwilling to permit to be inspected and copied or photographed, shall be admissible in evidence for any purpose at the instance of the party furnishing, or who should have furnished, the list, unless the court shall find that the party in so listing or failing to list acted in good faith and exercised reasonable diligence.

(d) Where a party unreasonably refuses to list documents or things, and thereby compels the other party to take depositions in order to obtain discovery in respect to their existence, location or custody, the party requesting such list shall be entitled, on application to the court, for an order requiring that the party so refusing shall pay to him the amount of the reasonable expense which he incurred by reason of the necessity for taking such deposition, including reasonable attorney fees.

(e) When an order is made that any party shall produce documents or things for inspection, copying or photographing, and it appears that the order was rendered necessary by the improper refusal of the party to permit such documents or things to be inspected, copied or photographed, such order shall require that there be paid by such party to the party obtaining the order, the amount of the reasonable expense incurred by the latter party by reason of the necessity for obtaining such order, including reasonable attorney fees.

(f) Where a party is requesfed, under the rules,

to admit the genuineness of any document or the truth of any fact, if such party or his attorney shall fail to serve such admission within the time fixed in such request, and if the party requesting the admission shall afterwards be required to establish the genuineness of any such documents or the truth of any such facts, and the same shall be proved or admitted, the party making such request may, on application to the court, obtain an order requiring the other party to pay to him the reasonable expense incurred by him in providing such proof, including reasonable attorney fees, unless it shall appear to the satisfaction of the court that there were good reasons for the refusal.

(g) Where an order has been made that any party or agent of a party shall answer designated questions, or shall produce designated documents or things for inspection, copying or photographing, or shall permit entry upon land for the purpose of inspecting the same, or shall submit to a physical or mental examination, and such party or agent shall refuse to obey such order, the court (1) may order that the matters regarding which the questions were asked, or that the character or description of such documents, things or land, or the contents of such documents, or that the physical or mental condition of such party, shall be deemed to be admitted, by the party so refusing, to be in accordance with the claim of the party obtaining such order; or (2) may by order deny the party the right to support or oppose any claim or defense with respect to which such discovery was required; or (3) may by order require certain facts to be admitted for the purpose of the action; or (4) may by order prohibit the introduction in evidence of certain documents or things or of certain testimony; or (5) may order a stay of further proceedings until the party or agent shall have satisfied the said order; or (6) may strike out any pleading or part thereof; or (7)

may dismiss the action or proceeding or any part thereof, with or without prejudice, or render judgment by default; or (8) may make two or more of the foregoing orders or may prescribe any other matter in the premises, which justice may require; and (9) the court may, in lieu of any of the foregoing orders, or in addition thereto, order the arrest of any party or agent of a party for disobeying any of such orders *except an order to submit to a physical or mental examination.* (Italics supplied.)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

No. 28

HERTHA J. SIBBACH, *Petitioner,*

vs.

WILSON & COMPANY, INC., *Respondent.*

Petition for Rehearing.

ROYAL W. IRWIN,
Counsel for Petitioner.

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HERTHA J. SIBBACH,

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Petition for Rehearing.

The petitioner herein, Hertha J. Sibbach, respectfully represents:

On January 13, 1941, this cause was reversed and remanded to the District Court for further proceedings in conformity to the opinion then rendered by a majority of the justices of the Court. The opinion of the majority held that Rule 35 of the Federal Rules of Civil Procedure was valid, contrary to petitioner's contention.

The following important statement in the majority opinion seems clearly to be based on a misconception:

"The suggestion that the rule offends the important right to freedom from invasion of the person ignores *the fact that a litigant need not resort to the federal*

courts unless willing to comply with the rule, and that, as we hold, no invasion of freedom from personal restraint attaches to refusal so to comply." (Opinion, p. 7; italics supplied.)

This statement is contrary to the fact that a cause may be removed from a state to a federal court against the wishes of the plaintiff (pursuant to 28 U. S. C. Sec. 71). The Federal Rules of Civil Procedure apply to removed cases by the express provision of Rule 81(c). Although the case at bar was commenced in a federal court, the validity of Rule 35 should not be determined without considering the application of the rule to removed cases, particularly since many tort and disability-insurance defendants are in a position to remove their cases from state to federal courts.

A consideration of Rule 35 in removed cases sharply accentuates the petitioner's contention that the adoption of the rule presented a matter for Congress to decide (rather than for this Court under the rule-making power) and that there is no danger of confusion if the rule is held invalid. Under Rule 35, when a non-citizen of Illinois is sued by an Illinois citizen in an Illinois state court for a tort committed in Illinois, the strong policy of Illinois courts against compulsory physical examinations can be circumvented by the defendant's removal of the case to a federal court. Even though the federal court may not hold the Illinois citizen in contempt for his refusal to be examined, the penalties for refusal imposed by subdivisions (i), (ii), and (iii) of section (b) (2) of Rule 37 make it impossible for him to maintain his cause of action and so compel him to submit to an examination.

Thus, without specific provision by Congress, this Court in Rule 35 has given a defendant in a removed case for use against an Illinois plaintiff a device that the Illinois courts have strongly and consistently condemned. Surely Congress did not intend by the Rules Enabling Act to

authorize the overriding of a deeply-felt state policy with a consequent change in the relationship of federal to state courts, as has been done by the adoption of Rule 35. This argument does not apply with comparable force to any of the other Federal Rules of Civil Procedure, so that other rules will not be endangered if Rule 35 is held invalid.

The ground for a rehearing is: as the opinion indicates, the Court, in holding Rule 35 valid, did not appreciate the effect of its holding upon the large and important class of removed cases.

Wherefore, petitioner respectfully prays that a rehearing be granted and that, upon further consideration, this Court hold Rule 35 invalid.

HERTHA J. SIBBACH,
Petitioner,

By ROYAL W. IRWIN,
Counsel for Petitioner.

Certificate.

Royal W. Irwin, counsel for petitioner, hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

ROYAL W. IRWIN,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES.

No. 28.—October Term, 1940.

Hertha J. Sibbach, Petitioner, *vs.* Wilson & Company, Inc. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 13, 1941.]

Mr. Justice Roberts delivered the opinion of the Court.

This case calls for decision as to the validity of Rules 35 and 37 of the Rules of Civil Procedure for District Courts of the United States.[1]

In an action brought by the petitioner in the District Court for Northern Illinois to recover damages for bodily injuries, inflicted in Indiana, respondent answered denying the allegations of the complaint, and moved for an order requiring the petitioner to submit to a physical examination by one or more physicians appointed by the court to determine the nature and extent of her injuries. The court ordered that the petitioner submit to such an examination by a physician so appointed.

Compliance having been refused, the respondent obtained an order to show cause why the petitioner should not be punished for contempt. In response the petitioner challenged the authority of the court to order her to submit to the examination, asserting that the order was void. It appeared that the courts of Indiana, the state where the cause of action arose, hold such an order proper,[2] whereas the courts of Illinois, the state in which the trial court sat, hold that such an order cannot be made.[3] Neither state has any statute governing the matter.

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[1] 28 U. S. C. A. following § 723c.

[2] Chicago *v.* McNally, 227 Ill. 14; Mattice *v.* Klawans, 312 Ill. 299; People *v.* Scott, 326 Ill. 327.

[3] South Bend *v.* Turner, 156 Ind. 418; Aspy *v.* Botkins, 160 Ind. 170; Lake Erie & W. R. Co. *v.* Griswold, 72 Ind. App. 265; Valparaiso *v.* Kinney, 75 Ind. App. 660.

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The court adjudged the petitioner guilty of contempt, and directed that she be committed until she should obey the order for examination or otherwise should be legally discharged from custody. The petitioner appealed.

The Circuit Court of Appeals decided that Rule 35, which authorizes an order for a physical examination in such a case, is valid and affirmed the judgment.[4] The writ of certiorari was granted because of the importance of the question involved.

The Rules of Civil Procedure were promulgated under the authority of the Act of June 19, 1934,[5] which is:

"Be it enacted . . . That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

"Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

The text of the relevant portions of Rules 35 and 37 is:

"Rule 35. Physical and Mental Examination of Persons.

"(a) Order for Examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

"Rule 37. Refusal to Make Discovery: Consequences.

"(a) Refusal to Answer. . . .

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[4] 108 F. (2d) 415.

[5] C. 651, 48 Stat. 1064; 28 U. S. C. § 723 b, c.

"(b) Failure to Comply With Order.

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party . . . refuses to obey . . . an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that . . . the physical or mental condition of the party, . . . shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order . . . prohibiting [the disobedient party] from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination."

The contention of the petitioner, in final analysis, is that Rules 35 and 37 are not within the mandate of Congress to this court. This is the limit of permissible debate, since argument touching the broader questions of Congressional power and of the obligation of federal courts to apply the substantive law of a state is foreclosed.

Congress has undoubted power to regulate the practice and procedure of federal courts,[6] and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States;[7] but it has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose, save where a right or duty is imposed in a field committed to Congress by the Constitution. On the contrary it has enacted that the state law shall be the rule of decision in the federal courts.[8]

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[6] Wayman *v.* Southard, 10 Wheat. 1, 21; Bank of the United States *v.* Halstead, 10 Wheat. 51, 53; Beers *v.* Haughton, 9 Pet. 329, 359, 361.

[7] Wayman *v.* Southard, *supra*, 42; Bank of the United States *v.* Halstead, *supra*, 61; Beers *v.* Haughton, *supra*, 359.

[8] R. S. 721, 28 U. S. C. § 725.

Hence we conclude that the Act of June 19, 1934, was purposely restricted in its operation to matters of pleading and court practice and procedure. Its two provisos or caveats emphasize this restriction. The first is that the court shall not "abridge, enlarge nor modify substantive rights", in the guise of regulating procedure. The second is that if the rules are to prescribe a single form of action for cases at law and suits in equity, the constitutional right to jury trial inherent in the former must be preserved. There are other limitations upon the authority to prescribe rules which might have been, but were not mentioned in the Act; for instance, the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute.[9]

Whatever may be said as to the effect of the Conformity Act[10] while it remained in force, the rules, if they are within the authority granted by Congress, repeal that statute, and the District Court was not bound to follow the Illinois practice respecting an order for physical examination. On the other hand if the right to be exempt from such an order is one of substantive law, the Rules of Decision Act[11] required the District Court, though sitting in Illinois, to apply the law of Indiana, the state where the cause of action arose, and to order the examination. To avoid this dilemma the petitioner admits, and, we think, correctly, that Rules 35 and 37 are rules of procedure. She insists, nevertheless, that by the prohibition against abridging substantive rights, Congress has banned the rules here challenged. In order to reach this result she translates "substantive" into "important" or "substantial" rights. And she urges that if a rule affects such a right, albeit the rule is one of procedure merely, its prescription is not within the statutory grant of power embodied in the Act of June 19, 1934. She contends that our decisions and recognized principles require us so to hold.

The petitioner relies upon *Union Pacific Railway Co.* v. *Botsford*, 141 U. S. 250, and *Camden & Suburban Ry.* v. *Stetson*, 177 U. S. 172. But these cases in reality sustain the validity of the rules. In

[9] Hudson *v.* Parker, 156 U. S. 277, 284; Venner *v.* Great Northern Ry. Co., 209 U. S. 24, 35; Davidson Marble Co. *v.* Gibson, 213 U. S. 10, 18; Meek *v.* Centre County Banking Co., 268 U. S. 426, 434.

[10] R. S. 914; 28 U. S. C. § 724.

[11] *Supra*, note 8.

the *Botsford* case an action to recover for a personal injury suffered in the territory of Utah[12] was instituted in the United States Circuit Court for Indiana, which refused to order a physical examination. This court affirmed, on the ground that no authority for such an order was shown. There was no suggestion that the question was one of substantive law. The court first examines the practice at common law and finds that it never recognized such an order. Then, acknowledging that a statute of the United States authorizing an order of the sort would be valid, the opinion finds there is none. Thus the matter is treated as one of procedure, for Congress has not, if it could, declared by statute the substantive law of a state. After stating that the decision law of Indiana on the subject appeared not to be settled, and that a cited statute of that State was not in point, the court added that the question was not one of the law of Indiana but of the law of the United States and that the federal statutes by their provisions as to proof in actions at law precluded the application of the Conformity Act. Again, therefore, the opinion recognized that the matter is one of procedure, for both the cited federal statutes, concerning the mode of proof in federal courts, and the Conformity Act, deal solely with procedure.

In fine, the decision was only that the making of such an order is regulable by statute, that the federal statutes forbade it, and hence the Conformity Act could not be thought to authorize the practice by reference to and incorporation of state law.

In the *Stetson* case the action was brought in the District Court for New Jersey by a citizen of Pennsylvania, who, while a citizen of New Jersey, had been injured in the latter state. A statute of New Jersey authorized the state courts to order a physical examination of a plaintiff in an action for damages pending therein. The District Court refused to order such an examination on the ground that it lacked power so to do. After a verdict and judgment for plaintiff the defendant appealed to the Circuit Court of Appeals, assigning the refusal as error. That court certified the question, and this court answered that the District Court had power to order the examination.

The court stated that in the *Botsford* case there was no statute authorizing such an order, but said that here there was a state statute which by the Rules of Decision Act was made a law of the United States and must be given effect in a trial in a federal court.

[12] The opinion does not so state, but the record filed in this court so shows.

While it is true the court referred to the Rules of Decision Act (R. S. 721) and not to the Conformity Act (R. S. 914) the entire discussion goes upon the assumption that the matter is procedural. In any event, the distinction between substantive and procedural law was immaterial, for the cause of action arose and the trial was had in New Jersey.[13]

In the instant case we have a rule which, if within the power delegated to this court, has the force of a federal statute, and neither the *Botsford* nor the *Stetson* case is authority for ignoring it.

The remaining case on which petitioner leans is *Stack* v. *New York, &c. R. R.*, 177 Mass. 155, where the court agreed with the view expressed in the *Botsford* case that common-law practice did not warrant the entry of such an order and said it was for the legislature rather than the courts to alter the practice. But if Rule 35 is within the authority granted, the federal legislature sanctioned it as controlling all district courts.

We are thrown back, then, to the arguments drawn from the language of the Act of June 19, 1934. Is the phrase "substantive rights" confined to rights conferred by law to be protected and enforced in accordance with the adjective law of judicial procedure? It certainly embraces such rights. One of them is the right not to be injured in one's person by another's negligence, to redress infraction of which the present action was brought. The petitioner says the phrase connotes more; that by its use Congress intended that in regulating procedure this court should not deal with important and substantial rights theretofore recognized. Recognized where and by whom? The state courts are divided as to the power in the absence of statute to order a physical examination.[14] In a number such an order is authorized by statute or rule.[15] The rules in question accord with the procedure now in force in Canada and England.[16]

The asserted right, moreover, is no more important than many others enjoyed by litigants in District Courts sitting in the several states, before the Federal Rules of Civil Procedure altered and abol-

[13] As above pointed out, if the matter is one of substantive law, R. S. 721 requires the application of the law of Indiana, which authorizes an order for examination.

[14] See Wigmore on Evidence (3d Ed.) § 2220, note 13.

[15] See Notes to the Rules of Civil Procedure, printed by the Advisory Committee March 1938, p. 32.

[16] Wigmore on Evidence (3d Ed.) § 2220, note 13; 31 & 32 Vict. c. 119, § 26.

ished old rights or privileges and created new ones in connection with the conduct of litigation. The suggestion that the rule offends the important right to freedom from invasion of the person ignores the fact that ~~a litigant need not resort to the federal courts unless willing to comply with the rule, and that,~~ as we hold, no invasion of freedom from personal restraint attaches to refusal so to comply. If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. That the rules in question are such is admitted.

Finally, it is urged that Rules 35 and 37 work a major change of policy and that this was not intended by Congress. Apart from the fact already stated, that the policy of the states in this respect has not been uniform, it is to be noted that the authorization of a comprehensive system of court rules was a departure in policy, and that the new policy envisaged in the enabling act of 1934 was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth. The challenged rules comport with this policy. Moreover, in accordance with the Act, the rules were submitted to the Congress so that that body might examine them and veto their going into effect if contrary to the policy of the legislature.

The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose.[17] Evidently the Congress felt the rule was within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules, although this specific rule was

[17] An analogy is found in the organic acts applicable to some of the territories, before their admission to statehood, which provided that laws passed by the territorial legislature should be valid unless Congress disapproved. § 5 of the Ordinance of 1787; see Pease v. Peck, 18 How. 595. Territory of Florida, § 5 of the act of March 30, 1822 (3 Stat. 655); territory of Louisiana, § 4 of the act of March 26, 1804 (2 Stat. 284), and § 3 of the act of March 3, 1805 (2 Stat. 331); territory of Minnesota, § 6 of the Act of March 3, 1849 (9 Stat. 405); territory of New Mexico, § 7 of the act of September 9, 1850 (9 Stat. 449); territory of Oregon, § 6 of the act of August 14, 1848 (9 Stat. 326); territory of Utah, § 6 of the act of September 9, 1850 (9 Stat. 455); territory

attacked and defended before the committees of the two Houses.[18] The Preliminary Draft of the rules called attention to the contrary practice indicated by the *Botsford* case, as did the Report of the Advisory Committee and the Notes prepared by the Committee to accompany the final version of the rules.[19] That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found. We conclude that the rules under attack are within the authority granted.

The District Court treated the refusal to comply with its order as a contempt and committed the petitioner therefor. Neither in the Circuit Court of Appeals nor here was this action assigned as error. We think, however, that in the light of the provisions of Rule 37 it was plain error of such a fundamental nature that we should notice it.[20] Section (b)(2)(iv) of Rule 37 exempts from punishment as for contempt the refusal to obey an order that a party submit to a physical or mental examination. The District Court was in error in going counter to this express exemption. The remedies available under the rule in such a case are those enumerated in Section (b)(2)(i)(ii) and (iii). For this error we reverse the judgment and remand the cause to the District Court for further proceedings in conformity to this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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of Washington, § 6 of the act of March 2, 1853 (10 Stat. 175); territory of Wisconsin, § 6 of the act of April 20, 1836 (5 Stat. 13). Similar provisions are now applicable to Alaska, Puerto Rico, the Virgin Islands and the Philippines. 48 U. S. C. §§ 90, 826, 1405(o), 1054.

Cf. the provisions for lying over before Congress in § 407 of the act of March 3, 1933 (47 Stat. 1519), and § 5 of the Reorganization Act of 1939 (53 Stat. 562).

[18] Hearings before the Committee on the Judiciary, House of Representatives, 75th Cong., 3rd Sess., pp. 117–141; Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Senate, 75th Cong., 3rd Sess., pp. 36-37, 39, 51.

[19] Preliminary Draft (May, 1936) of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia, Advisory Committee on Rules for Civil Procedure, p. 71; Notes to the Rules of Civil Procedure for the District Courts of the United States (March, 1938), p. 32.

[20] Supreme Court Rule 27, par. 6; Mahler v. Eby, 264 U. S. 32, 45; Kessler v. Strecker, 307 U. S. 22, 34.

PREME COURT OF THE UNITED STATES.

No. 28.—October Term, 1940.

Hertha J. Sibbach, Petitioner,
vs.
Wilson & Company, Inc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 13, 1941.]

Mr. Justice Frankfurter, dissenting.

ion Pacific Railway Co. v. *Botsford*, 141 U. S. 250, denied the r of the federal courts in a civil action to compel a plaintiff for injury to the person to submit to a physical examination. years later, in *Camden and Suburban Railway Co.* v. *Stetson*, . S. 172, the *Botsford* decision was treated as settled doctrine. resent issue is whether the authority which Congress gave to ourt to formulate rules of civil procedure for the district courts displacement of the law of the *Botsford* case. Stated more ularly, is Rule 35, authorizing such physical examination, under the Rules Enabling Act of June 19, 1934; 48 Stat. 1064; S. C. § 723b-c. It is urged that since this Rule pertains to dure, it is valid because outside the limitations of that Act, by "said rules shall neither abridge, enlarge, nor modify the antive rights of any litigant".

aking with diffidence in support of a view which has not com- ed itself to the Court, it does not seem to me that the answer question is to be found by an analytic determination whether wer of examination here claimed is a matter of procedure or ter of substance, even assuming that the two are mutually ex- e categories with easily ascertainable contents. The problem to me to be controlled by the policy underlying the *Botsford* n. Its doctrine was not a survival of an outworn technicality. ted on considerations akin to what is familiarly known in the sh law as the liberties of the subject. To be sure, the im- y that was recognized in the *Botsford* case has no constitu- sanction. It is amenable to statutory change. But the "in- ility of a person" was deemed to have such historic roots glo-American law that it was not to be curtailed "unless

by clear and unquestionable authority of law". In this connection it is significant that a judge as responsive to procedural needs as was Mr. Justice Holmes, should, on behalf of the Supreme Judicial Court of Massachusetts, have supported the *Botsford* doctrine on the ground that "the common law was very slow to sanction any violation of or interference with the person of a free citizen". *Stack* v. *New York, etc., R. R.*, 177 Mass. 155, 157.

So far as national law is concerned, a drastic change in public policy in a matter deeply touching the sensibilities of people or even their prejudices as to privacy, ought not to be inferred from a general authorization to formulate rules for the more uniform and effective dispatch of business on the civil side of the federal courts. I deem a requirement as to the invasion of the person to stand on a very different footing from questions pertaining to the discovery of documents, pre-trial procedure and other devices for the expeditious, economic and fair conduct of litigation. That disobedience of an order under Rule 35 cannot be visited with punishment as for contempt does not mitigate its intrusion into an historic immunity of the privacy of the person. Of course the Rule is compulsive in that the doors of the federal courts otherwise open may be shut to litigants who do not submit to such a physical examination.

In this view little significance attaches to the fact that the Rules, in accordance with the statute, remained on the table of two Houses of Congress without evoking any objection to Rule 35 and thereby automatically came into force. Plainly the Rules are not acts of Congress and can not be treated as such. Having due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the Rules were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality. And so I conclude that to make the drastic change that Rule 35 sought to introduce would require explicit legislation.

Ordinarily, disagreement with the majority on so-called procedural matters is best held in silence. Even in the present situation I should be loath to register dissent did the issue pertain merely to diversity litigation. But Rule 35 applies to all civil litigation in the federal courts, and thus concerns the enforcement of federal rights and not merely of state law in the federal courts.

Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice MURPHY agree with these views.